

Institutional balance and community method in the implementation of EU legislation following the Lisbon treaty

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Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden. The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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INSTITUTIONAL BALANCE AND COMMUNITY METHOD IN THE IMPLEMENTATION OF EU LEGISLATION FOLLOWING THE LISBON TREATY

MERIJJN CHAMON*

Abstract

On paper, the Lisbon Treaty radically changed the way in which EU law is implemented by defining a new institutional balance in Articles 290 and 291 TFEU, bringing decision-making in this area more in line with the traditional Community method. However, the real reform brought by the Lisbon Treaty depends on how the political institutions and the Courts interpret and apply the new Treaty rules. An analysis of seven years of post-Lisbon institutional practice and case law shows that in reality the institutions have largely undone Lisbon's reform, meaning that the post-Lisbon institutional balance in this area largely resembles the pre-Lisbon one and that decision-making in this area fails to align with the Community method ideal type.

1. Introduction

In 2007, the EU Member States agreed on reforming the EU through the Treaty of Lisbon. One area which saw a fundamental reform was that of the implementation of EU law which had hitherto been governed by Articles 202 and 211 EC. The new Articles 290 and 291 TFEU laid down a new institutional balance for executive rule-making. Any discussion at the time could only result in preliminary conclusions, since a lot would depend on how the new rules would be applied by the political institutions and interpreted by the Court of Justice.¹ Over the past few months, the EU Courts have delivered

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1. Kröll, “Delegierte Rechtsetzung und Durchführungsrechtsetzung und das institutionelle Gleichgewicht der Europäischen Union”, 66 ZöR (2011), 253–298, at 298; Ritleng, “La délégation du pouvoir législatif de l’union européenne”, in Cohen-Jonathan, Constantinesco, Michel, Piris and Wachsmann (Eds.), *Chemins d’Europe: Mélanges en l’honneur de Jean Paul Jacqué* (Dalloz, 2010), p. 576.

a number of judgments in this area while the institutions have adopted a new Common Understanding on delegated acts, allowing for a first general assessment of the actual reform brought by the Lisbon Treaty.

More specifically, this article focuses on the following issues: (i) the notion of essential elements, which is key to distinguishing legislative acts from non-legislative acts; (ii) the non-delegation doctrine in Article 290 TFEU, which sets the limits to the Commission's power to adopt delegated acts; (iii) the relation between Articles 290 and 291 TFEU or the question when a non-legislative act should be adopted as either a delegated act or as an implementing act; and (iv) executive rule-making outside Articles 290 and 291 TFEU, or the question whether non-legislative binding acts can only be adopted in the form of either a delegated or an implementing act. These issues are of fundamental importance because they determine how EU law may be applied and what the horizontal (inter-institutional) and vertical (EU-Member states) power relations are in this field.

In order not to lose sight of the bigger picture, these issues will be discussed from a more general constitutional perspective, further illustrating the relationship between two rather elusive concepts in EU constitutional law: institutional balance and the Community method. The resulting analysis helps understand the Lisbon Treaty's true repercussions for EU executive rule-making and shows that despite the Lisbon Treaty's radical re-definition of the institutional balance in Articles 290 and 291 TFEU, the Court's post-Lisbon case law results in an institutional balance resembling the pre-Lisbon institutional balance. Together with the political institutions' practice this means that the framework for executive rule-making in the EU has not been fundamentally altered.

2. The institutional balance and the Community method

The institutional balance is a principle often referred to but generally ill-understood, and depending on how it is conceived also of little practical use.² In line with Smulders and Eisele it is understood here as a legal concept

2. This is especially so if the institutional balance is seen as exogenous to the Treaties. See Lenaerts and Verhoeven, "Institutional Balance as a Guarantee for democracy in EU Governance", in Joerges and Dehousse (Eds.), *Good Governance in Europe's Integrated Market* (OUP, 2002), p. 47; Michel, *Institutionelles Gleichgewicht und EU-Agenturen* (Duncker & Humblot, 2015), p. 91. For a more developed critique, see Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (OUP, 2016), pp. 268–70. Similarly, if the institutional balance is a way of referring to how the EU institutions actually function, its legal value is also null.

“according to which the EU institutions have to act within the limits of their respective powers as provided for by the Treaty.”³

Still, in order to have any use as a legal *principle*, institutional balance should be more than the idea that the institutions have to respect the limits to their powers,⁴ which in itself already follows from Article 13(2) TEU. The limits, procedures and conditions referred to in that Article are not always clear, however, in which case a principle of institutional balance which is “created by the Treaties”⁵ would allow them to be deduced from the constitutional charter through legal reasoning. This way, the gaps left by the explicit Treaty provisions may be filled,⁶ even if the Court so far seems reluctant to employ the principle as such.⁷

The question *in casu* then is which institutional balance is laid down in Articles 290 and 291 TFEU,⁸ and whether these Articles leave certain issues unaddressed, allowing the Court to interpret these provisions in light of the institutional balance enshrined in those Articles. The present conceptualization of the institutional balance further shows how final

3. Smulders and Eisele, “Reflections on the Institutional Balance, the Community Method and the Interplay between Jurisdictions after Lisbon”, 31 YEL (2012), 112–117, at 114. Lenaerts and Verhoeven break down the legal principle in three sub-rules; see Lenaerts and Verhoeven, *op. cit. supra* note 2, pp. 44–45.

4. Chalmers has criticized the Court for not treating the institutional balance as a principle. See Chalmers, “Justifying institutional accommodation”, 33 EL Rev. (2008), 455–456, at 456. See also Chamon, “The Institutional Balance, an ill-fated principle of EU law?”, 21 EPL (2015), 371–392.

5. Case C-70/88, *Parliament v. Council*, EU:C:1990:217, para 21.

6. Chamon, *op. cit. supra* note 4, at 385; Le Bot, *Le principe de l'équilibre institutionnel en droit de l'union européenne* (Université Panthéon-Assas, 2012), PhD Thesis, p. 259; Prechal, “Institutional balance: A fragile principle with uncertain contents”, in Heukels, Blokker and Brus (Eds.), *The European Union after Amsterdam* (Kluwer Law International, 1998), pp. 277–278.

7. See Chamon, *op. cit. supra* note 4, at 382–383; Le Bot, *op. cit. supra* note 6, p. 298. The *MFA* case is illustrative in this regard. While the case lend itself perfectly to the application of an institutional balance test it was solved differently. See Case C-409/13, *Council v. Commission*, EU:C:2015:217. For a discussion see Chamon, “Upholding the ‘Community method’: Limits to the Commission’s power to withdraw legislative proposals”, 40 EL Rev. (2015), 895–909, at 907–908.

8. Understanding the institutional balance as not exogenous to the Treaties shows the difficulty in the argument made by Blumann in relation to the Lisbon Treaty: “En matière d’exécution, la séparation des pouvoirs, . . . connaît une montée en puissance *au détriment* du principe d’équilibre institutionnel.” See Blumann, “Le système normatif de l’Union européenne vingt ans après le traité de Maastricht”, (2012) R.A.E.-L.E.A., 235–258, at 256 (own emphasis).

conclusions on the actual institutional balance can only be drawn once the Court has interpreted those Articles.⁹

The Community method is not defined in the Treaties or any official document but it is generally juxtaposed with the intergovernmental method and, recently, the Union method,¹⁰ and is often used to describe the EU's unique *legislative* process.¹¹ However, an institutional balance perspective shows that such a conceptualization is too restrictive. Indeed, if it is a genuine *method*, it potentially characterizes several of the different institutional balances laid down in the Treaties and not just those in the legislative sphere.

The Community method then uniquely distinguishes the EU *both* from other international organizations¹² and from (federal) States in a number of ways: Member States are directly involved at the federal level, decisions, including binding decisions, may be taken by majority, a unique independent body safeguards the general interest,¹³ the citizens of the supranational polity are directly represented at the international level in a parliamentary assembly with proper decision-making powers, and the political process is subjected to the compulsory jurisdiction of a court of law.¹⁴ As a result, in both the creation

9. This also follows from the declaration theory adopted by the ECJ in *Denkavit*, see Case 61/79, *Denkavit*, EU:C:1980:100. See also Schütze, *European constitutional law* (Cambridge University Press, 2012), p. 300.

10. The Union method proposed by Chancellor Merkel in 2010 was generally rejected as mere political discourse. See Sarrazin and Kindler, “‘Brücke sehen und sterben’ – Gemeinschaftsmethode versus Unionsmethode”, 35 *Integration* (2012), 213–222; Ponzano, “Community and intergovernmental method: an irrelevant debate?”, 23 *Notre Europe Policy Brief* (2011), 1–4. Recently however, Eijsbouts and Reestman have made a case to take it seriously: see Eijsbouts and Reestman, “Editorial: In search of the Union Method”, 11 *EuConst.* (2015), 425–433. Yet, their embryonic argument does not really convince as it requires non-EU instruments to be recognized as EU law and to accept the Member States as the highest EU authority. Trying to counter the idea that there cannot be any authority outside the law, they stress that in the EU legal order (*stricto sensu*) there already are different procedures to adopt primary and secondary legislation (a question in reality distinct from that on the *Rechtsstaat*). The Union method proposed then seems to boil down to the complete supremacy of the Member States and a methodology characterized by “politics trumps law”.

11. See e.g. Kranz, “Gibt es ein Demokratiedefizit in der Europäischen Union?”, 51 *Arch. VR* (2013), 403–425, at 411; Gatto, “Governance in the European Union: A legal perspective”, 12 *CJEL* (2006), 488–516, at 491; von Bogdandy, Arndt and Bast, “Legal instruments in European Union law and their reform: A systematic approach on an empirical basis”, 23 *YEL* (2004), 91–136, at 124.

12. See Devuyst, “The European Union’s institutional balance after the Treaty of Lisbon: ‘Community method’ and ‘democratic deficit’ reassessed”, 39 *GJIL* (2008), 247–326, at 251.

13. Dehousse, “The ‘Community method’ at sixty”, in Dehousse (Ed.), *The “Community Method” – Obstinate or Obsolete?* (Palgrave Macmillan, 2011), p. 5.

14. Le Bot, *op. cit. supra* note 6, p. 41.

and application of the law, the EU legal order is much more advanced, or State-like, than the decentralized and primitive international legal order.¹⁵

The Community method allows for effective action at the international level¹⁶ and is not simply meant to protect the smaller Member States.¹⁷ Rather, it allows the reconciliation of different interests,¹⁸ whereby decision-making results in the adoption of binding acts, subject to the compulsory jurisdiction of the Court of Justice. Understanding the Community method in this way allows it to be traced also beyond the legislative sphere, in areas such as executive rule-making, external relations, etc. *In casu*, this begs the question of whether the new institutional balance laid down in Article 290 and 291 TFEU is a move towards or away from the Community method ideal type.

3. Pre- and post-Lisbon comitology from the perspective of the institutional balance and the Community method

3.1. *The pre-Lisbon development of comitology*

Applying both concepts helps in understanding comitology's development since the 1960s.¹⁹ In the EU's system of executive federalism,²⁰ the Member States are primarily responsible for implementing EU law, the exception being direct administration, i.e. EU institutions implementing EU law. Before the Single European Act (SEA), the latter exception largely rested on the legal basis of Article 155 EEC which provided that "the Commission

15. See Kelsen, *Principles of International Law* (Rhinehart, 1952), p. 22. See further Armstrong, Farrell and Lambert, *International Law and International Relations* (Cambridge University Press, 2007), pp. 12–13.

16. Dehousse, op. cit. *supra* note 13, p. 8.

17. See e.g. Pech, "The institutional development of the EU post-Lisbon: A case of plus ça change...?", in Ashiagbor, Countouris and Lianos (Eds.), *The European Union after the Treaty of Lisbon* (Cambridge University Press, 2012), p. 15. Similarly, Temple Lang, "Checks and balances in the European Union: The institutional structure and the 'Community Method'", 12 EPL (2006), 127–154, at 134–136.

18. Dehousse, op. cit. *supra* note 13, pp. 6–7. See also COM(2001)428, at 8.

19. For a historical discussion of comitology, see Demmke, Eberharter, Schaefer and Türk, "The history of comitology", in Pedler and Schaefer (Eds.), *Shaping European Law and Policy* (EIPA, 1996), pp. 61–82. See also Bergström, *Comitology: Delegation of Powers in the European Union and the Committee System* (OUP, 2006).

20. Lenaerts, "A new institutional equilibrium? In search of the 'trias politica' in the European Community", in Engel and Wessels (Eds.), *From Luxembourg to Maastricht: Institutional Change in the European Community after the Single European Act* (Europa Union, 1992), pp. 142–143.

shall . . . exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.”

The institutional balance resulting from this provision was clear: the Commission *could* be empowered by the Council. In political terms this was rather unbalanced since the Council had unfettered discretion in its choice of conferring (or not) powers on the Commission. Its discretion also had vertical repercussions, since Article 155 EC did not impose any requirements before Member States could be divested of their prerogative to implement EU law. It is from this field of tension that the comitology-experiment grew: the Commission was empowered to implement European law but it was assisted (or controlled) in this by committees composed of national civil servants.

From a Community method perspective, comitology was partially laudable, since the Member states have a legitimate interest in the implementation of EU law, even if this was not recognized by the institutional balance defined in Article 155 EEC. Still, given the Council’s discretion and the resulting weak position of the Commission, comitology was far from completely in line with the Community method and instead was a variation thereon. This was not because of “the introduction of implementation committees into the decision-making process”,²¹ since these committees precisely allowed the legitimate interests of the national administrations to be taken into account, but because of the preponderance of intergovernmental over supranational decision-making.

The subsequent Treaty modifications then brought a further alignment of the institutional balance to the general Community method, by strengthening the position of the Commission (SEA,²² Lisbon Treaty) and by recognizing the legitimate role of the Parliament (Lisbon Treaty).²³ While the Lisbon Treaty has been criticized in general for marginalizing the Community method,²⁴ this does not seem to be the case for Articles 290 and 291 TFEU.

21. Scott and Trubek, “Mind the Gap: Law and new approaches to governance in the European Union”, 8 *ELJ* (2002), 1–18, at 3.

22. See Glaesner, “The Single European Act: Attempt at an appraisal”, 10 *Fordham International Law Journal* (1987), 446–502, at 469; Blumann, “Le pouvoir exécutif de la commission à la lumière de l’Acte unique européen”, 24 *RTDE* (1988), 23–60, at 30–32. For a more mixed evaluation, see Institut d’Études Européennes, *L’Acte Unique Européen — Journée d’Études, Bruxelles 1er mars 1986* (Université Libre de Bruxelles, 1986), pp. 22–25.

23. The reform of the second comitology decision in 2006 already strengthened Parliament’s position, see Schusterschitz and Kotz, “The Comitology Reform of 2006: Increasing the powers of the European Parliament without changing the Treaties”, 3 *EuConst* (2007), 68–90; Szapiro, “Comitologie: Rétrospective et prospective après la réforme de 2006”, (2006) *Revue du droit de l’Union européenne*, 545–586.

24. This because of a weakening of the Commission and the further recognition of the European Council. See Temple Lang, *op. cit. supra* note 17; Devuyst, *op. cit. supra* note 12.

3.2. The post-Lisbon framework

The Lisbon Treaty introduced the new Articles 290 and 291 TFEU, resulting in a new institutional balance that is much more in keeping with the Community method.²⁵

Article 290 TFEU	Article 291 TFEU
<p>1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.</p> <p>The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.</p> <p>2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:</p> <p>(a) the European Parliament or the Council may decide to revoke the delegation;</p> <p>(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.</p> <p>For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.</p> <p>3. The adjective “delegated” shall be inserted in the title of delegated acts.</p>	<p>1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.</p> <p>2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.</p> <p>3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers.</p> <p>4. The word “implementing” shall be inserted in the title of implementing acts.</p>

25. Hofmann, “Legislation, delegation and implementation under the Treaty of Lisbon: Typology meets reality”, 15 ELJ (2009), 482–505, at 504; Ritleng, op. cit. *supra* note 1, p. 572. However, Barents saw a weakening of the Commission, see Barents, *Het Verdrag van Lissabon, Achtergronden en commentaar* (Kluwer, 2008), pp. 461–462.

Summarizing briefly,²⁶ the Lisbon Treaty introduced a distinction between the modification of formal legislative acts (through executive acts) and the genuine, or pure, implementation of legislation.²⁷ The commingling of the two pre-Lisbon was an anomaly since the Commission performs a different function when it implements (in the strict sense) or when it changes (formal) legislation. The former is normally done by the Member States, the latter by the EU legislature, meaning different interests are affected when the Commission exercises the one or the other function. The distinction between the two has therefore meant that the (new) institutional balance in this area reflects more properly the Community method: only the Member States are involved when the Commission acts under Article 291 TFEU, only the legislature when the Commission acts under Article 290 TFEU.

In addition, Article 291(2) TFEU now also qualifies the scenario in which recourse should be made to the exception of direct administration. This “objectification”²⁸ opens the possibility for the Court to enforce Article 291(2) TFEU. The second paragraph also rightly identifies the Commission as the default EU authority to adopt implementing acts, upping the threshold before the Council may be empowered.

The 2011 Comitology Regulation²⁹ respected the new institutional balance in the sense that it purged the Council’s involvement in comitology. The Regulation did leave intact the old regulatory procedure with scrutiny (the so-called PRAC)³⁰ which largely covers the field of the delegated act under Article 290 TFEU. The process of updating all existing references in

26. For a more extensive discussion, see e.g. Bergström and Ritleng (Eds.), *Rulemaking by the European Commission* (OUP, 2016), p. 280; Bast, “New categories of acts after the Lisbon Reform: Dynamics of parliamentarization in EU law”, 49 CML Rev. (2012), 885–927, at 908–919.

27. De Witte, “Legal instruments and law-making in the Lisbon Treaty”, in Griller and Ziller (Eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty* (Springer, 2008), p. 99.

28. See Kröll, op. cit. *supra* note 1, at 283; Blumann, “Un nouveau départ pour la Comitologie. Le règlement n° 182/2011 du 16 février 2011”, 47 CDE (2011), 23–52, at 26. Differently, Schütze noted that the legislature is free to delegate under Art. 291 TFEU, but that the Commission can only act if the Member States fail in implementing EU legislation in a sufficiently uniform manner. See Schütze, “‘Delegated’ legislation in the (new) European Union: A constitutional analysis”, 74 MLR (2011), 661–693, at 691. In light of this Dubos observes that the legislature will have to justify its choice to empower the Commission under Art. 291 TFEU. See Dubos, “Objectif d’efficacité de l’exécution du droit de l’union européenne: La tectonique des compétences”, in Neframi (Ed.), *Objectifs et compétences dans l’Union européenne* (Bruylant, 2012), p. 297.

29. Regulation (EU) 182/2011 of the European Parliament and of the Council, O.J. 2011, L 55/13.

30. The PRAC was introduced in 2006 as an alternative to the delegated act foreseen by the (failed) Constitutional Treaty. See *supra* note 3.

legislation to the PRAC should have been concluded by the end of the 7th parliamentary term in 2014 but is still ongoing.³¹

The preliminary conclusion based on the new provisions in primary and secondary legislation would find that the Commission succeeded in undermining the (old) comitology system,³² but still begs the question of how the institutional practice, especially the Court's case law, has evolved post-Lisbon.

4. The Courts' interpretation of Articles 290 and 291 TFEU

Following the entry into force of the Lisbon Treaty, Christiansen and Dobbels rightly warned that the new Treaty provisions did not conclude the reform process.³³ Indeed, following the negotiations on the new Treaty, the infra-constitutional rules (e.g. the Comitology Regulation and possible inter-institutional agreements) must be adopted; finally there are the negotiations on each legislative proposal in which the constitutional and infra-constitutional rules are applied. Since the Comitology Regulation has already formed the subject of several commentaries,³⁴ the following sections will focus immediately on the Court's case law in relation to some of the contentious issues left open by the Lisbon Treaty. Most often these were inter-institutional conflicts whereby every institution involved requested the Court to confirm its own reading of the Treaties.³⁵ While there are many

31. For a discussion, see Chamon, "Dealing with a zombie in EU law: The regulatory comitology procedure with scrutiny", 23 MJ (2016), 721–723.

32. See the question raised by Craig, *The Lisbon Treaty: law, politics and treaty reform* (OUP, 2010), p. 56–57.

33. Christiansen and Dobbels, "Comitology and delegated acts after Lisbon: How the European Parliament lost the implementation game", 16 *European Integration Online Papers* (2012) <eiop.or.at/eiop/texte/2012-013a.htm>, p. 8.

34. Xhaferri, "Delegated acts, implementing acts, and institutional balance implications post-Lisbon", 20 MJ (2013), 557–575, at 566–70; Chamon, "Comitologie onder het Verdrag van Lissabon", 61 SEW (2013), 63–75; Blumann, op. cit. *supra* note 28; Craig, "Delegated acts, implementing acts and the new Comitology Regulation", 36 EL Rev. (2011), 671–687; Daiber, "EU-Durchführungsrechtsetzung nach Inkrafttreten der neuen Komitologie-Verordnung", 47 EuR (2012), 240–253.

35. With the entry into force of the Lisbon Treaty the Commission adopted a Communication and internal guidelines on the issue; the Parliament adopted two Resolutions in 2010 and 2014; the Council Legal Service adopted an opinion; and in 2011 a Common Understanding on delegated acts was adopted by the three institutions (now replaced with a new Common Understanding, cf. *infra*). See COM(2009)673; SEC(2011)855; Resolution of the European Parliament of 5 May 2010 on the power of legislative delegation, O.J. 2011, C 81E/6; European Parliament resolution of 25 Feb. 2014 on follow-up on the delegation of legislative powers and control by Member States of the Commission's exercise of implementing

issues left open (or even raised) by Articles 290 and 291 TFEU,³⁶ the present contribution will focus on those which the Court has already clarified (to some extent). These issues relate to (i) the demarcation line between legislation and non-legislative acts, (ii) the non-delegation doctrine in Article 290 TFEU, (iii) the demarcation line between delegated and implementing acts and (iv) executive rule-making outside Articles 290 and 291 TFEU.

4.1. *The demarcation line between legislative and non-legislative acts*

Pre-Lisbon, the Court had drawn the line between legislative acts and implementing (in the broad, pre-Lisbon, sense) acts according to the notion of “essential elements”. According to the Court in *Köster*, the Treaty “establish[ed] a distinction . . . between the measures directly based on the Treaty itself and derived law intended to ensure their implementation. It cannot therefore be a requirement that all the details . . . be drawn up by the Council according to [the legislative procedure]. It is sufficient . . . that the basic elements of the matter to be dealt with have been adopted in accordance with [that] procedure.”³⁷ In *Germany v. Commission* the Court further clarified that the essential provisions are those “which are intended to give concrete shape to the fundamental guidelines of Community policy.”³⁸ The Commission therefore held discretionary or wide powers whenever it implemented legislation, although the Commission did not enjoy the same discretion in every policy field.³⁹

On this issue, the Lisbon Treaty was significant because it codified *Köster* in primary law, albeit not fully since it is not codified in Article 291 TFEU, the provision concerning implementing acts.⁴⁰ In light of the observations above, the codification in 290 TFEU provides the Court with a new reference point allowing it to elaborate its jurisprudence, subjecting the political process to abstract legal principles. The legislature therefore minimally has to decide on the essential elements itself.⁴¹ Similarly, the Commission must be able to

powers; Council Legal Service, Application of Arts. 290 (delegated acts) and 291 (implementing acts) TFEU, 11 Apr. 2011, 8970/11.

36. See e.g. Stancanelli, “Le système décisionnel de l’Union”, in Amato, Bribosia and de Witte (Eds.), *Genèse et destinée de la constitution européenne* (Bruylant, 2007), p. 525.

37. Case 25/70, *Köster*, EU:C:1970:115, para 6.

38. Case C-240/90, *Germany v. Commission*, EU:C:1992:408, para 37.

39. See Case 22/88, *Vreugdenhil BV*, EU:C:1989:277, para 17.

40. This itself is not an omission, but simply a result of the different functions of the delegated and implementing act. Still, some authors do find the silence on the substantive limits to the Commission’s powers under Art. 291 TFEU (compared to Art. 290 TFEU) problematic, see *infra* note 35.

41. Whether the legislature should therefore also limit itself to deciding on the essential elements is unclear. The final report of the Convention’s Working Group on Simplification

identify the essential elements of any basic legislative act which it is called upon to amend or supplement. Can a general rule be devised allowing for the identification of these essential elements? Bergström faults the Treaty authors for not addressing this “grey zone”,⁴² but it seems doubtful whether it would be feasible and appropriate to deal with this question in a constitutional charter. Following the entry into force of the Lisbon Treaty the Court had the opportunity to give some further guidance on a number of occasions.

4.1.1. *The essential elements are those subject to political choices*

The *Schengen Borders Code* case was the first such opportunity.⁴³ Under the PRAC, the Council, in its executive capacity, had adopted a decision supplementing the Schengen Borders Code (SBC). The rules and guidelines in question applied to rescue operations during border surveillance missions coordinated by Frontex. The Parliament challenged the decision, arguing that it dealt with issues that did not come under the SBC and that the decision therefore went beyond the amendment of the SBC’s non-essential elements. The Court in its ruling explicitly clarified that identifying the essential elements is not for the legislature alone to decide, but instead “must be based on objective factors amenable to judicial review.”⁴⁴

The Court found that the essential elements are those that are the subject of *political* choices. As a result, the Council in the contested decision was not allowed to add elements which require political choices to be made. The ECJ then proceeded by juxtaposing the content of the contested decision with its legal basis (Art. 12 of the SBC). The latter deals with border surveillance, defining its main purpose as “[preventing] unauthorized border crossings, [countering] cross-border criminality and [taking] measures against persons who have crossed the border illegally.”⁴⁵ Article 12 itself being very succinct, it does not “contain any rules concerning the measures which border guards are authorized to apply against persons or ships when they are apprehended”⁴⁶

states that the introduction of the delegated act could encourage the legislature to do so. See European Convention, CONV 424/02, p. 9. In this sense also Ritleng, op. cit. *supra* note 1, pp. 570–571; Stancanelli, op. cit. *supra* note 36, p. 523.

42. Bergström, op. cit. *supra* note 19, p. 359.

43. Case C-355/10, *Parliament v. Council (Schengen Borders Code)*, EU:C:2012:516. The case itself did not deal with a delegated act but with an act adopted pursuant to the PRAC (a precursor to the delegated act). A.G. Mengozzi noted the consensus on the relevance of the case for the current Art. 290 TFEU. See Opinion of A.G. Mengozzi in Case C-355/10, *Parliament v. Council*, EU:C:2012:207, para 29 at footnote 32.

44. Case C-355/10, *Parliament v. Council*, para 67.

45. See Art. 12 (1) of Regulation (EC) No 562/2006 of the European Parliament and of the Council, O.J. 2006, L 105/1.

46. Case C-355/10, *Parliament v. Council*, para 73.

but its fifth paragraph does allow “additional measures governing border surveillance” to be adopted via the PRAC.

Given this framework, could the contested decision on the rules for search and rescue operations be qualified as “measures governing surveillance that are additional to the provisions of Article 12 SBC”? The Court thought not, for two connected reasons: firstly there was no clear reference point in the SBC for the contested implementing measures,⁴⁷ secondly defining the enforcement powers of border guards is an issue of political significance given its potential impact on human rights (of migrants) and the sovereign rights of third States.

4.1.2. *No areas a priori reserved to the legislature*

Does this mean that issues such as human or third States’ rights are always reserved to the legislature? This is what Parliament aimed to argue in the *Europol* case,⁴⁸ when it challenged the Council’s decision extending the list of third States with which Europol can conclude agreements for data transmission.⁴⁹ The Council’s decision was based on Article 26(1)a of the (pre-Lisbon) Europol decision,⁵⁰ which allowed the Council to *implement* the Europol decision. The Parliament argued *inter alia* that the list was an essential element of the basic Europol decision, since it was “liable to have serious consequences for the fundamental rights of citizens”;⁵¹ but the Court was not convinced, since the possibility of data transmission was taken up in the basic legislative act itself and because inclusion on the list does not mean that the transmission of personal data to that country is immediately enabled: for this, a further agreement between Europol and the third country concerned was required.⁵² The Court also noted that Europol’s external relations are only (?) ancillary to its core activities and that the Europol decision itself laid down the possibility of developing such relations and their objectives as well as their framework.⁵³ The political choices were therefore contained in the legislative act setting up Europol.

47. In this respect, the *SBC* case is similar to pre-Lisbon *Philippines Border Security* where the Court accepted that security is a pre-condition for development but ruled that the Commission’s decision fell outside the scope of the basic regulation since the latter did not contain express provisions on the matter. See Case C-403/05, *Parliament v. Commission*, EU:C:2007:624, para 59.

48. Case C-363/14, *Parliament v. Council*, EU:C:2015:579.

49. Council Implementing Decision (EU) 2014/269, O.J. 2014, 138/104.

50. See Decision (JHA) 2009/371 of the Council, O.J. 2009, L 121/37.

51. Case C-363/14, *Parliament v. Council*, para 52.

52. *Ibid.*, paras. 53–55.

53. Case C-363/14, *Parliament v. Council*, paras. 49–50.

4.1.3. *It's the legislative framework, stupid!*

That it is the framework defined in the basic legislative act itself that firstly determines whether a secondary measure touches on the essential elements or not may also be seen in the *Czech Republic v. Commission* and *Multiannual cod plan* cases.

*Czech Republic v. Commission*⁵⁴ concerned the legality of two delegated regulations⁵⁵ supplementing the Directive on Intelligent Transport Systems (ITS).⁵⁶ The Directive creates a framework for the Member States to deploy ITS, the aim of which is to allow maximal efficient use of road infrastructure. The two contested delegated regulations prescribed *inter alia* that Member States ought to designate independent national bodies to monitor private parties' compliance.

According to the Czech Republic, this requirement had no basis in the legislative act – the Directive – since they could not be qualified as specifications under Article 6 of the Directive (which the Commission was entitled to adopt). As a result, the requirement to designate independent national bodies supplemented or amended an essential element of the Directive. However, the General Court stressed that the specifications could relate to the entirety of the Directive and not just to its Article 6.⁵⁷ In this regard, the General Court noted that Article 4, point 17 of the Directive provides that a specification “means a binding measure laying down provisions containing requirements, procedures or *any other relevant rules*” (own emphasis), while Article 6 provided “organizational provisions that describe the procedural obligations of the various stakeholders” and stated that the “specifications shall, as appropriate, provide for conformity assessment.” Before stressing these provisions in the basic legislative act, the General Court had also noted, that the Commission had been granted a discretionary power, since “les compétences de la Commission au titre d’une délégation se distinguent des compétences d’exécution, notamment en ce qui concerne la marge d’appréciation dont elle dispose.”⁵⁸ In light of this, the General Court found that the vague reference points in the Directive were not problematic; after all, the Commission had a margin of appreciation in

54. Joined Cases T-659 & 660/13, *Czech Republic v. Commission*, EU:T:2015:771.

55. Commission Delegated Regulation (EU) 885/2013, O.J. 2013, L 247/1; Commission Delegated Regulation (EU) 886/2013, O.J. 2013, L 247/6.

56. Directive 2010/40/EU of the European Parliament and of the Council on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport, O.J. 2010, L 207/1.

57. See Joined Cases T-659 & 660/13, *Czech Republic v. Commission*, para 58.

58. *Ibid.*, para 47.

considering whether those requirements were necessary for the achievement and effective enforcement of the Directive.⁵⁹

In the *Multiannual cod plan* cases,⁶⁰ the Council, in its executive capacity, had amended the Regulation establishing the multiannual plan for cod stocks.⁶¹ The Council had thereby made use of Article 43(3) TFEU which allows it to “adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities.” The Commission and Parliament argued that the contested decision ought to be adopted as a legislative act pursuant to Article 43(2) TFEU.

Both institutions argued that Article 43(2) TFEU was the default provision to be relied upon, whereas Article 43(3) TFEU could only be used to adopt *sui generis* implementing measures fixing (*inter alia*) the total allowable catches (TACs) and the fishing opportunities.⁶² However, the contested regulation laid down the methodology to fix these TACs and opportunities and a possibility to derogate from the default rules (laid down in the basic legislative regulation). According to the Council, this was not problematic since the two Treaty provisions exist autonomously from each other and because Article 43(3) TFEU allows measures *on* the fixing of TACs and opportunities, not just measures fixing those TACs and opportunities.⁶³

While the controversy raised many interesting issues, the ECJ decided it rather straightforwardly by applying its finding in the *Venezuela* case which had been ruled a couple of months previously.⁶⁴ In *Venezuela*, the Court had already clarified the relationship between paragraphs 2 and 3 of Article 43 TFEU,⁶⁵ finding that Article 43(2) TFEU allows policy choices to be made, whereby the legislature has to assess the necessity of the proposed measures for the attainment of the CFP’s objectives.⁶⁶ Article 43(3) TFEU however does not require such an assessment, since the measures adopted on that basis “are of a primarily technical nature and are intended to be taken in order to implement provisions adopted on the basis of Article 43(2).”⁶⁷ The question to resolve in *Multiannual cod plan* then was whether the Council had made policy choices or whether the contested regulation merely constituted measures of a technical nature. The Court concluded that the Council had

59. Ibid., paras. 63–65.

60. Joined cases C-124 & 125/13, *Parliament and Commission v. Council*, EU:C:2015:790.

61. Council Regulation (EU) 1243/2012, O.J. 2012, L 352/10.

62. Joined Cases C-124 & 125/13, *Parliament and Commission v. Council*, paras. 33–34.

63. Ibid., paras. 40–41.

64. Joined Cases C-103 & 165/12, *Parliament and Commission v. Council*, EU:C:2014:2400.

65. A very recent case in which this issue was also put to the Court is Case C-113/14, *Germany v. Parliament and Council*, EU:C:2016:635.

66. Joined Cases C-103 & 165/12, *Parliament and Commission v. Council*, para 48.

67. Ibid., para 50.

“appreciably altered”⁶⁸ the rules for determining the TACs and that it had also “substantially amended”⁶⁹ the rules for determining the fishing opportunities. While the new rules did not affect the objectives of the basic legislative act,⁷⁰ the Court noted that the amendments “define the legal framework in which fishing opportunities are established and allocated. They thus result from a policy choice having a long-term impact on the multiannual recovery plan for cod stocks.”⁷¹ As a result, the contested regulation had been adopted on the wrong legal basis.

4.1.4. *Identifying the essential elements and the resulting institutional balance*

How have the Courts clarified the demarcation line and what institutional balance results from this case law? Firstly the Court relied on a *petitio principii*: the essential elements are the elements which are the subject of political decisions. This begs the question: which decisions are political? To which the answer probably is: those deciding the essential elements. However, what matters most, at least for practitioners, is whether the Court’s ruling is workable and from this perspective the Court has perhaps come close to the most workable abstract principle, appealing to our understanding that there are political and a-political (or at least “less political”) issues, without clearly distinguishing between the two.

It further follows from *SBC* and *Europol* (see above) that there are no fixed areas that are (a-)political.⁷² Instead, in each area policy has to be set by the legislature and may then be worked out by means of non-legislative acts. In this regard not too much importance should be attached to the fact that the Court in *SBC* and *Europol* reserved the *political* choices to the legislature, while in *Multiannual cod plan* (and *Venezuela*) it spoke of *policy* decisions.⁷³ What is important, also from the perspective of institutional balance, is that

68. Joined Cases C-124 & 125/13, *Parliament and Commission v. Council*, para 73.

69. *Ibid.*, para 75.

70. *Ibid.*, para 77.

71. *Ibid.*, para 80. It is not clear here whether the fact that provisions in the contested decision allowed the Council *not to apply* an annual adjustment of the TAC (or fishing effort) was a deciding factor. The Court’s language (in para 76) does not seem to affirm this, but those provisions perfectly illustrate how the Council fundamentally revised the legislative regulation.

72. Interpreting the *SBC* case completely differently on this point, see Voermans, Hartmann and Kaeding, “The quest for legitimacy in EU secondary legislation”, 2 *Theory and Practice of Legislation* (2014), 5–32, at 23.

73. The difference appears purely semantic in light of other language versions. In French, German and Italian there is no distinction between policy and political choices. In Dutch a distinction may be made, but the Dutch version of the *Multiannual cod plan* (and *Venezuela*) cases refers to political choices (like in *SBC* and *Europol*), not to policy choices (like the English version does).

the Court has reserved to itself the competence to draw the demarcation line.⁷⁴ The Court could have left this in the hands of the legislature,⁷⁵ but instead subjected this to judicial review, analogously to the choice for a legal basis.

Equally importantly, the Court in the *Multi-annual cod plan* cases confirmed that the distinction between essential and non-essential elements is also relevant where the Council exercises a *sui generis* implementing power (derived directly from the Treaties). Bergström noted that such implementing acts “will not have to be confined to non-essential elements and, therefore, . . . these non-legislative acts could and most likely will have the same substantive quality as legislative acts.”⁷⁶ In this regard, it should be stressed that the Court actually read Article 43(2) and (3) TFEU together instead of autonomously as suggested by the Council.⁷⁷ However, not every *sui generis* implementing power of the Council can be linked to a provision conferring powers on the EU legislature in the way Article 43(3) TFEU can be linked to Article 43(2) TFEU. While this is for instance the case for Articles 78(3) and 95(3) TFEU (to be read together with Arts. 78(2) and 91(1) TFEU), the *sui generis* implementing provisions of *inter alia* Articles 42(a), 74 and 109 TFEU appear genuinely self-standing.

Distinguishing the essential from the non-essential requires an analysis of both the measures in question and their context. In this respect a fairly coherent test emerges from the case law. The Court thus checks the content of the contested measures in the light of the relevant provision of the legislative act, and that provision is in turn situated in the general context of the legislative act. The odd case seems to be Joined Cases T-659 & 660/13, *Czech Republic v. Commission*, in which the framework for the delegated acts of the Commission was only scantily worked out in the legislative act. Here the General Court relied on the wide discretion afforded to the Commission when it adopts delegated acts as opposed to when it adopts implementing acts, but this was later overruled by the Court in *Connecting Europe Facility* (see below).

In terms of institutional balance it is worth stressing again that the ECJ reserved to itself the power to draw the line between essential and non-essential elements. Further, looking at the Court’s actual scrutiny, it cannot really be said that it defers to the viewpoint of the legislature. Of course, it is largely the legislature determining the context, but the Court still goes quite a long way in ascertaining the objective factors allowing the

74. Stressing this, see Xhaferri, op. cit. *supra* note 34, at 564.

75. Making a suggestion to this end, see Voermans, “Delegeren is een kwestie van vertrouwen”, 25 *RegelMaat* (2010), 165–181, at 174. Similarly, see Ritleng, op. cit. *supra* note 1, p. 574.

76. Bergström, op. cit. *supra* note 19, pp. 353–354.

77. See Joined Cases C-124 & 125/13, *Parliament and Commission v. Council*, para 58.

identification of the essential elements. The picture which emerges from the Courts' case law may be juxtaposed with the positions taken by the EU institutions following the entry into force of the Lisbon Treaty. In this respect it need not come as a surprise that the Council's Legal Service and the Parliament had stressed the primary responsibility of the legislature in identifying the essential elements.⁷⁸ For equally evident reasons, the Commission noted that it did "not intend to interpret these criteria [such as non-essential elements] in the abstract; the very wide range of measures that might be envisaged in a given situation precludes any attempt at classification."⁷⁹ While no genuine abstract criterion may be identified in the Court's case law, the test set out above does allow a more structured approach than simply dealing with it ad hoc. From this perspective, the Court's case law should be evaluated positively, as it puts a check on a dominant legislature and because it (modestly) enhances foreseeability.

4.2. *The non-delegation doctrine in Article 290 TFEU*

While Article 290 TFEU obviously allows for the delegation of (materially) legislative powers, the Treaty provision also enshrines a non-delegation doctrine. Firstly Article 290 TFEU prescribes an essentiality test (see above). Secondly, it contains a specificity test, prescribing that the "objectives, content, scope and duration of the delegation of power should be explicitly defined."⁸⁰ As Kollmeyer notes, some authors find that these elements are part of the essentiality test,⁸¹ while in fact the two should be seen as distinct. This is clear if one considers the logic underlying a delegation. Under Article 290 TFEU this ratio is not that the Commission might decide on (all) non-essential elements, but instead that decision-making is done more efficiently than possible under a legislative procedure. By definition then, a delegation is an exception to the rule and any exception ought to be reasoned and properly circumscribed in order to remain an exception. If the legislature did not define the "objectives, content, scope and duration" of a delegation,

78. The Parliament noted that the Commission's "delegated power can only consist in supplementing or amending parts of a legislative act which the Legislator does not consider to be essential." See Resolution of 5 May 2010, O.J. 2011, C 81E/6. The Council Legal Service was less adamant but still noted that "[t]he legislature has a considerable margin of discretion in determining the essential and nonessential elements of the acts it adopts." See Council Legal Service, 11 Apr. 2011, 8970/11.

79. European Commission, COM(2009)673, at 4.

80. Confusing the two tests, see Hofmann, *op. cit. supra* note 25, at 488–9.

81. Kollmeyer, *Delegierte Rechtsetzung in der EU – Eine Analyse der Art. 290 und 291 AEUV* (Nomos, 2015), p. 266.

even if it decided on all the essential elements, the exceptional character of the delegation would not be ensured.

The question of whether, apart from the explicit essentiality and specificity tests,⁸² further non-delegation elements could be read into Article 290 TFEU does not seem too far-fetched in light of the Court's pre-Lisbon case law.⁸³ The case in point here is *Alliance for Natural Health*, in which the Court set strict limits to the Commission's power to amend legislative acts. One would assume that in this case of pre-Lisbon comitology the Court would simply apply its traditional *Köster* test. The Court indeed did so but also imposed further limitations: "[W]hen the Community legislature wishes to delegate its power to amend aspects of the legislative act at issue, it must ensure that that power is clearly defined and that the exercise of the power is subject to strict review in the light of objective criteria (see, to that effect, *Meroni v. High Authority*) . . . In this instance . . . the recitals to Directive 2002/46 . . . limit the Commission's power to modify the lists through their reference to objective criteria connected exclusively with public health. They show that in this instance the Community legislature laid down the essential criteria to be applied in the matter when the powers thus delegated are exercised (see, to that effect, Case 25/70 *Köster*)."⁸⁴

The Court here confused its case law on legislative conferrals to the Commission (*Köster*) with Commission delegations to private bodies (*Meroni*).⁸⁵ It should be clear however that if the Commission's power under Article 290 TFEU were also governed by the *Meroni* doctrine,⁸⁶ then the scope left for the Commission to adopt any delegated acts would be extremely limited, since it could not exercise any discretionary powers. While this case law has not yet been transposed to the delegation regime under Article 290 TFEU,⁸⁷ such a transposition cannot *a priori* be excluded and *Alliance for Natural Health* in any case shows how further implied non-delegation

82. For an illustration of how the Courts can review Commission (in)action in the light of the legislative mandate, see Case T-521/14, *Sweden v. Commission*, EU:T:2015:976.

83. However, Craig notes: "Whether the Community courts would be willing to [enforce a non-delegation doctrine] with vigour remains to be seen, and history does not indicate vigorous judicial enforcement of such criteria by the Community courts." See Craig, "The Role of the European Parliament under the Lisbon Treaty", in Griller and Ziller (Eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty* (Springer, 2008), p. 116.

84. Joined cases C-154 & 155/04, *Alliance for Natural Health*, EU:C:2005:449, paras. 90–92.

85. For a discussion, see Chamon, op. cit. *supra* note 2, pp. 222–224.

86. Case 9/56, *Meroni and Co. v. High Authority*, EU:C:1958:7.

87. Several authors seem to miss this point when they suggest that the Commission's power under Art. 290 (or 291) TFEU could be tested under the *Meroni* doctrine. See Nieto Garrido and Martín Delgado, *European Administrative Law in the Constitutional Treaty* (Hart Publishing, 2007), p. 13; Voermans, Hartmann and Kaeding, op. cit. *supra* note 72, at 17–18. See also *infra* note 136.

elements could be read into Article 290 TFEU (or Art. 291 TFEU for that matter).

In the post-Lisbon *Connecting Europe Facility* case⁸⁸ the Parliament challenged a delegated act of the Commission⁸⁹ because the delegated act amended its basic legislative act while the latter only allowed the Commission to specify certain funding priorities (“*detailing*” them).⁹⁰ Indeed, the basic legislative act did not refer to the notions of “amending” or “supplementing” as may be found in Article 290 TFEU. The case thus raised some fundamental issues: what is the relationship between amending and supplementing? and what does the legislature’s silence mean for the Commission’s power to adopt delegated acts? Advocate General Jääskinen concluded that if the legislature uses ambiguous terms then the Commission is left the choice of how the delegated act will affect the basic legislative act, since the legal effects of an amendment or supplementation are the same (see further below). After all, if both branches of the legislature had been adamant about not letting the Commission amend their legislative act, they could always have used the notion of supplementation foreseen in Article 290 TFEU itself.⁹¹

In a perhaps unexpected dogmatic turn, the ECJ found differently. While it agreed with the Advocate General that there are only two types of delegated act,⁹² it attached special importance to the distinction between amending and supplementing, ignoring its earlier *Visa reciprocity* ruling (see further below). Thus, when the Commission supplements an act it has a more limited authority and must conform to the entire basic legislative act.⁹³ While this is true, the Court hereby seems to overemphasize the effects of a typical amending delegated act. Such amendments normally merely relate to updating the annexes of legislative acts,⁹⁴ or to update EU legislative acts in light of the EU’s international obligations.⁹⁵ A supplementing delegated act can then be used to achieve the same results as an amending delegated act, with the exception of adding provisions that would directly contravene provisions in the legislative act. Yet, the Court found a fundamental difference between the two types of delegated act and found support for this in the Lisbon Treaty’s *travaux préparatoires* and in the Commission’s own internal

88. Case C-286/14, *Parliament v. Commission*, EU:C:2016:183.

89. Commission Delegated Regulation (EU) 275/2014, O.J. 2014, L 80/1.

90. See Art. 21 (3) of Regulation (EU) 1316/2013 of the European Parliament and of the Council, O.J. 2013, L 348/129.

91. The A.G. also hinted at this, see Opinion of A.G. Jääskinen in Case C-286/14, *Parliament v. Commission*, EU:C:2015:645, para 62.

92. Case C-286/14, *Parliament v. Commission*, para 32.

93. *Ibid.*, paras. 41–42.

94. For a discussion, see Kollmeyer, *op. cit. supra* note 81, pp. 140–53.

95. *Ibid.*, pp. 148–9.

guidelines relating to Article 290 TFEU. In both, “amending” is juxtaposed to “fleshing out the detail”. In light of this, the Court found that if the legislature allows the Commission to “detail” certain funding priorities, this should be understood as allowing the Commission to only supplement the legislative act.

The Court’s ruling strengthened the non-delegation doctrine in Article 290 TFEU and may prove to complicate delegated law-making merely for the sake of a legal nicety. As will be elaborated below, it may be questioned whether the Court should not also have scrutinized the legislative regulation in light of its earlier ruling in *Biocides*.

4.3. *The demarcation line between delegated and implementing acts*

Unlike the first demarcation line, the one distinguishing delegated from implementing acts did not exist pre-Lisbon when both functions were qualified as implementation and both were exercised under the comitology regime. The Treaty authors should therefore be lauded for distinguishing these two radically different functions, prescribing different procedures and different acts depending on whether an executive law-making function or an implementing function is exercised. While this clarification was also generally supported in legal doctrine,⁹⁶ it was clear from the outset that certain measures “supplementing a legislative act” might at the same time be qualified as measures ensuring “the uniform implementation” of a binding EU legal act and *vice versa*. Still, there was disagreement whether such an overlap would have to be tolerated or whether the Court should enforce the distinction between the two acts strictly.⁹⁷

4.3.1. *The confirmation of a grey zone and the legislature’s discretion:*

Biocides and Visa reciprocity

*Biocides*⁹⁸ presented the first case for the Court to clarify the demarcation line. At issue was the validity of the legislature’s mandate to the Commission to fix the fees payable to the European Chemicals Agency (ECHA) under the Biocides Regulation through implementing acts. According to the Commission, it ought to have been granted a delegated instead of an implementing power, since it was effectively asked to supplement instead of

96. Very critically however, see Vos, “Editorial: White and black smoke coming from the Justus Lipsius building”, 11 MJ (2004), 252–232, at 228–230; Bergström, *op. cit. supra* note 19, pp. 351–363.

97. Bast and Bianchi did not find the overlap problematic. See Bast, *op. cit. supra* note 26, at 920–921; Bianchi, “La comitologie est morte! Vive la comitologie!”, 48 RTDE (2012), 75–116, at 93. For authors that argued for a (more) strict separation, see *infra* footnotes 124 and 130.

98. Case C-427/12, *Commission v. Parliament and Council*, EU:C:2014:170.

implement the Regulation, the legislature merely having defined general principles which could not be readily implemented.

The ECJ set out its decision by identifying the functions of the two acts, finding that a delegated act is used “to achieve the adoption of rules coming within the regulatory framework as defined by the basic legislative act”,⁹⁹ while an implementing act allows the Commission “to provide further detail in relation to the content of a legislative act, in order to ensure that it is implemented under uniform conditions in all Member States.”¹⁰⁰ Crucially then, the Court confirmed that the legislature has a discretion in choosing between the two and that, as a result, it would only intervene if the legislature has manifestly erred when granting the one or the other power to the Commission. Evidently, this meant that the Court rejected the Commission’s argument on Articles 290 and 291 TFEU constituting two mutually exclusive realms. The Court then concluded that the legislature could reasonably have taken the view that its framework applicable to the fees was complete and therefore merely required further implementation, rather than supplementation, by the Commission.

In *Visa reciprocity*,¹⁰¹ the Commission again challenged a legislative mandate but this time it had received a delegated power, arguing that it ought to have been conferred an implementing power. The Court in *Visa reciprocity* confirmed its previous ruling in *Biocides* and also resolved a number of ambiguities that had persisted following *Biocides*.¹⁰² As to the facts of the case, *Visa reciprocity* dealt with the mechanism to suspend or retract visa waivers for the nationals of those third countries that impose visa requirements on Schengen-nationals. The mechanism follows several stages where firstly a visa exemption may be suspended through an implementing act; in the second stage the suspension is effectuated through a delegated act which also adds a footnote next to the third country concerned in the annex to the basic legislative regulation. Finally, in a third stage the Commission may submit a legislative proposal amending the basic legislative regulation.

The Commission argued that in the second stage it would simply be implementing the rules of the basic regulation and that adding a footnote next to an entry in an annex to the basic legislative act could not be qualified as an amendment in the sense of Article 290 TFEU.¹⁰³ As to the legal effects of the

99. *Ibid.*, para 38.

100. *Ibid.*, para 39.

101. Case C-88/14, *Commission v. Parliament and Council*, EU:C:2015:499.

102. See Ritleng, “The dividing line between delegated and implementing acts: The Court of Justice sidesteps the difficulty in *Commission v. Parliament and Council (Biocides)*”, 52 CML Rev. (2015), 243–257, at 250–257.

103. Case C-88/14, *Commission v. Parliament and Council*, para 20.

addition of such a footnote, the Commission argued that it was “a mere technical tool used abusively in order to disguise the implementing act as a delegated act.”¹⁰⁴

In its decision, the ECJ confirmed again that the legislature has a wide discretion when choosing between Article 290 or 291 TFEU, something which was still debated following *Biocides*.¹⁰⁵ Also in line with *Biocides*, the Court refused to elaborate the Treaty framework by identifying further criteria. It thereby unambiguously noted that “neither the existence nor the extent of the discretion conferred on it by the legislative act is relevant for determining whether the act to be adopted by the Commission comes under Article 290 TFEU or Article 291 TFEU.”¹⁰⁶ This part of *Visa reciprocity* overrules the General Court’s finding in *Czech Republic v. Commission* (see above).¹⁰⁷ Differently from *Biocides* however, the Court did not really connect the two Treaty provisions any more. In *Biocides* it still noted that “the concept of an implementing act within the meaning of Article 291 TFEU must be assessed in relation to the concept of a delegated act, as derived from Article 290 TFEU”¹⁰⁸ but in *Visa reciprocity* the Court found that it only needed to be ascertained whether the conditions of Article 290 TFEU were met, i.e. whether the Commission had been empowered to adopt acts of general application amending (or supplementing) the non-essential elements of the basic legislative act.¹⁰⁹ The Court found that this was indeed the case, and dismissed the Commission’s action. It thereby noted that the three stages of the mechanism are “characterized by measures of increasing gravity and political sensitivity, to which instruments of different kinds correspond.” While this idea of increasing gravity has a certain appeal, it does not really find a basis in the Treaties.¹¹⁰

Finally, as to the question whether the basic legislative act would be amended by the Commission’s delegated acts, the Court noted that they would

104. Ibid., para 21.

105. See Ritleng, op. cit. *supra* note 102, at 254; Chamon, “Clarifying the divide between delegated and implementing acts?”, 42 LIEI (2015), 175–189, at 184–188; Buchanan, “The conferral of power to the Commission put to the test”, 5 EJRR (2014), 267–272, at 271.

106. Case C-88/14, *Commission v. Parliament and Council*, para 32.

107. The margin of discretion left to the Commission had also been suggested in doctrine as a criterion to distinguish Arts. 290 and 291 TFEU. See Jacqué, “Introduction: Pouvoir législatif et exécutif dans l’UE”, in Auby and Dutheil de la Rochère (Eds.), *Droit Administratif Européen* (Bruylant, 2007), p. 47; Kröll, op. cit. *supra* note 1, at 284; Ritleng, op. cit. *supra* note 1, p. 575. See also *infra* note 136.

108. Case C-427/12, *Commission v. Parliament and Council*.

109. Case C-88/14, *Commission v. Parliament and Council*, para 32.

110. Indeed, the idea of “increasing gravity” should not be confused with a hierarchy of norms which is generally read into Arts. 289, 290 and 291 TFEU. Even on this however Bast notes that “the Treaty does not provide for a hierarchical distinction between delegated and implementing acts.” See Bast, op. cit. *supra* note 26, at 924.

have “the effect of amending, if only temporarily, the normative content of the legislative act in question.”¹¹¹ In this regard, the importance of the footnote was relativized by the Court and taken to demonstrate “the intention of the EU legislature to insert the act adopted on the basis of [the contested] provision in the actual body of [the legislative regulation], as amended.”¹¹² In *Visa reciprocity*, then, the Court seems to accept that a legislative act may *effectively* be amended without an actual change to the text of that act. However in *Connecting Europe Facility* (see above) the Court again opted to understand “amending” in a formal sense.

4.3.2. *Reviewing an implementing act in light of the legislative mandate: Eures network*

In *Eures network*,¹¹³ the Parliament challenged a Commission decision implementing Regulation 492/2011 setting out the basic rules on the free movement of workers. Article 38 of the regulation generally provided: “The Commission shall adopt measures pursuant to this Regulation for its implementation.” This Article was the legal basis of the contested Decision through which the Commission set up the Eures network promoting labour mobility *inter alia* by allowing the exchange of information between national authorities on job vacancies and applications. In its application, the Parliament argued that the Commission had overstepped its mandate, since the contested decision *supplemented* certain non-essential elements of the regulation.¹¹⁴ *Eures network* therefore offered an opportunity to the Court to clarify both the notion of supplementation and the dividing line between implementing and delegated acts.

In its ruling, the Court rightly remarked that the present case differed from *Biocides* since it was not the legislature’s choice that was challenged but the exercise by the Commission of the powers conferred by the legislature.¹¹⁵ The Court recalled the function of an implementing act as defined in *Biocides*,¹¹⁶ and recalled its pre-Lisbon case law following which the Commission may “adopt all the measures which are necessary or appropriate for the implementation of [a basic] act, provided that they are not contrary to it” and

111. Case C-88/14, *Commission v. Parliament and Council*, para 42 (emphasis added). Pre-*Visa reciprocity*, Kröll had already argued that the notion of amendment could also cover such a situation. See Kröll, op. cit. *supra* note 1, at 267.

112. Case C-88/14, *Commission v. Parliament and Council*, para 43.

113. Case C-65/13, *Parliament v. Commission*, EU:C:2014:2289.

114. See Action brought on 7 Feb. 2013 – *European Parliament v. European Commission*, O.J. 2013, C 108/17.

115. Case C-65/13, *Parliament v. Commission*, para 42.

116. *Ibid.*, para 43.

provided that they comply with the basic act's essential general aims,¹¹⁷ without, in the light of Article 290 TFEU, amending or supplementing the basic legislative act.¹¹⁸ The Court thus seemed to *de facto* accept a discretionary power for the Commission, although it was careful to avoid referring to the Commission's powers as "wide", as it had done in the pre-Lisbon case law which it cited.

The Court then applied its test, scrutinizing the provisions flagged by the Parliament after having identified the "essential general aims" of the Regulation. By focusing on these essential general aims,¹¹⁹ the Court put the bar very high for the Parliament to show that the Commission acted *ultra vires*. Indeed, the Court subsequently rejected all the Parliament's arguments, noting that even if the arrangements adopted by the Commission were not explicitly foreseen by the legislature, they all served the "essential general aims" of the Regulation.¹²⁰ Further, the Commission had not erred in judging them "necessary or appropriate" to implement the Regulation. Finally, the Court also concluded that the arrangements did not amend or supplement the framework set out by the legislative act,¹²¹ meaning they were genuine implementing measures. This brief résumé may give the impression that the Court only exercised a marginal review, requiring a manifest error on the part of the Commission to be shown, but the Court actually did not emphasize any significant Commission discretion in this respect (see also above) and went through the different elements of the Parliament's plea exhaustively (although perhaps not thoroughly).

4.3.3. *Drawing the dividing line between delegated and implementing acts*

How has the Court drawn the dividing line and how has it (re-)defined the institutional balance laid down in Articles 290 and 291 TFEU? Although the Court confirmed that the two types of act perform different functions, it has not imposed an impermeable border between them, thereby rejecting the

117. *Ibid.*, para 44.

118. *Ibid.*, para 45.

119. Emphasizing the "essential general aims" of the legislative regulation, see paras. 44, 46, 49, 50, 52, 53, 54, 55 and 58 of Case C-65/13, *Parliament v. Commission (Eures network)*.

120. A.G. Cruz Villalón however proposed to uphold the action on one plea, since the coordination office was also tasked with "developing a general approach to labour mobility", whereas under the legislative regulation it only had a technical and practical role. See Opinion of A.G. Cruz Villalón in Case C-65/13, *Parliament v. Commission*, EU:C:2014:2071, paras. 69–79.

121. Emphasizing the framework set by the legislative regulation (and how the contested decision did not divert from it), see paras. 60, 64, 67, 70, 71, 82, 87, 92 of Case C-65/13, *Parliament v. Commission (Eures network)*.

Commission's longstanding claim that they are mutually exclusive.¹²² That claim should be contrasted to that of the Council Legal Service which had argued that "it is just as clear that in use, the two procedures are not exclusive categories, but overlap considerably."¹²³ The Court confirmed that the legislature has a wide discretion in choosing between the two Articles,¹²⁴ whereas some had initially feared too great a Commission discretion.¹²⁵ Obviously, when making its choice the legislature has to respect the conditions foreseen in the Treaty provisions but those minimum conditions at the same time now appear to be maximum conditions.¹²⁶

From an institutional balance perspective, the Council (as the legislature) enjoys significant powers under Article 290 TFEU, but also under Article 291 TFEU since the comitology committees are composed of national experts. While the Commission may exercise executive powers under both provisions, decision-making through comitology is more technocratic, while decision-making under Article 290 TFEU is politicizable. Lastly, the Parliament will have a clear preference for empowering the Commission under Article 290 TFEU, given its control powers and its marginal role under Article 291 TFEU. The effects of the Court's rulings are then favourable to the Council and the Member States. The Commission on the other hand is left with little leverage. While the Parliament is part of the ordinary legislature, the lack of further criteria is not conducive to its institutional position either, given its absence in comitology procedures.¹²⁷

122. In its 2009 communication, the Commission noted: "[A]n act based on Art. 290 is by definition excluded from the scope of Art. 291, and vice versa. The authors of the new Treaty clearly intended the two Arts. to be mutually exclusive." See COM(2009)673, at 3.

123. Council Legal Service, 8970/11, point 10.

124. Such a discretionary choice for the legislature had traditionally been rejected. See e.g. Stancanelli, *op. cit. supra* note 36, p. 524; Schütze, *op. cit. supra* note 28, at 690. However, arguing in favour of such a discretion, see Bast, *op. cit. supra* note 26, at 921.

125. See Sydow, "Europäische exekutive Rechtsetzung zwischen Kommission, Komitologieausschüssen, Parlament und Rat", 67 JZ (2012), 157–165, at 159–160; Bergström, *op. cit. supra* note 19, p. 357. Of course, this choice would not be in the hands of the Commission as noted by Ponzano, "'Executive' and 'delegated' acts: The situation after the Lisbon Treaty", in Griller and Ziller (Eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty* (Springer, 2008), p. 140. Still Blumann is right to point out that the Commission will influence this in its legislative proposals. See Blumann, *op. cit. supra* note 8, at 257.

126. The Parliament in its 2010 resolution had also rejected "the insertion in basic acts of provisions imposing on the Legislator additional obligations over and above those already contained in Art. 290 TFEU." See O.J. 2011, C 81E/6, point 10.

127. In its 2014 (pre-*Biocides*) resolution, the Parliament listed a number of further criteria that could help draw the distinction between Arts. 290 and 291 TFEU. See Parliament resolution of 25 Feb. 2014 on follow-up on the delegation of legislative powers and control by Member States of the Commission's exercise of implementing powers, point 1.

It is worth noting again that the Court explicitly confirmed the legislature's discretion and this differently from the other grey zone, i.e. that between the essential and the non-essential elements, although the Court in both cases scrutinizes in rather extensive fashion the legislature's choice.¹²⁸ The same goes for the Court's scrutiny of the Commission's implementing act in *Eures network*, where the Court *de facto* confirms the Commission's significant discretion, while still extensively scrutinizing the act in light of the legislative mandate.

Since the Court confirmed that the two types of act have different functions one could try to develop a reasoning along these lines but here the problem would also be that the functions are defined vaguely and in an overlapping way. After all, the power to "adopt rules coming within the regulatory framework as defined by the basic legislative act", which is the function of a delegated act, seems to apply *a fortiori* to an implementing act, since the "further detail which they provide in relation to the content of a legislative act" should necessarily remain within the framework set by the legislative act – as confirmed in *Eures network*.

In this regard, a tension between *Connecting Europe Facility* and *Biocides* may also be noted. In the first case, the mandate "to add further detail" by way of a delegated act was interpreted by the ECJ as a mandate to supplement the legislative act. In light of *Biocides* then, the legislature had prescribed delegated acts to perform the function of an implementing act (adding further detail). Evidently, the Parliament in *Connecting Europe Facility* had not raised an objection of illegality against its own act, but it could be argued that the Court should have done so of its own motion,¹²⁹ finding both the illegality of the delegated regulation *and* its legal basis in the legislative act. The Court's restraint in this area means that the Lisbon Treaty's redefined institutional balance is not enforced in practice, the reform being partially undone.¹³⁰ In Community method terms, the Court's restraint means that certain issues are still (wholly) left to the political arena instead of the Court imposing abstract criteria structuring the political process.

128. Whether this extensive scrutiny is also thorough may be debated in light of the legislature's discretion. On this tension, see also Chamón, "The dividing line between delegated and implementing acts, part two: The Court of Justice settles the issue in *Commission v. Parliament and Council (Visa reciprocity)*", 52 CML Rev. (2015), 1617–1633, at 1621–1622.

129. That this possibility exists was confirmed early on, see Case 14/59, *Société des Fonderies de Pont-à-Mousson v. High Authority*, EU:C:1959:31, p. 230. Whether it was possible *in casu* depends on whether the issue concerned a matter of public policy. See in this regard also the criteria developed by A.G. Jacobs in his Opinion to Case C-210/98 P, *Salzgitter v. Commission*, EU:C:2000:172, paras. 139–43.

130. In this respect Kröll noted in 2011: "Eine trennscharfe Abgrenzung der Geltungsbereiche von Art 290 und 291 AEUV ist zur Wahrung des institutionellen Gleichgewichts unabdingbar." See Kröll, *op. cit. supra* note 1, at 267.

4.3.4. *Implementing, supplementing and amending clarified*

The above cases shed light on how the crucial notions of implementation, supplementation and amendment are to be understood. Thus, *Biocides* tells us that implementation means adding further detail. Stressing the *further* detail implies that an implementing act can only add detail to something that is already provided in the basic act. However, the Court does not apply this in an overtly strict manner and is satisfied if the basic act provides for the “essential general aims”, as is clear from *Eures network*. If that is the case, the Commission has the power to adopt any implementing measure that is necessary or appropriate. *Eures network* therefore confirms the continued relevance of the broad (pre-Lisbon) notion of implementation which left quite some discretion to the Commission.

So when does adding further detail cease to be implementation and instead become supplementation? The Court stressing the framework established by the legislative act in *Eures network* would suggest that as long as the Commission does not change the framework of the basic act, it is not supplementing that act. However, in *Biocides*, the Court also defined the function of the delegated act as adopting “rules coming within the regulatory framework as defined by the basic legislative act”, while in *Visa reciprocity* it ruled that “neither the existence nor the extent of the discretion conferred on it by the legislative act is relevant for determining whether the act to be adopted by the Commission comes under Article 290 TFEU or Article 291 TFEU.”¹³¹ This shows that both under implementation and supplementation, and contrary to the institutions’ original positions,¹³² the framework of the basic act can never be changed and the level of discretion left to the Commission is immaterial for the choice between Article 290 and 291 TFEU.

In light of this, can it be concluded that, substantively, an implementing act can effect everything which is in the scope of a delegated act (bar the formal

131. Case C-88/14, *Commission v. Parliament and Council*, para 32.

132. In its 2009 Communication, the Commission noted that if “the future measure specifically adds new non-essential rules which change the framework of the legislative act, leaving a margin of discretion to the Commission ..., the measure could be deemed to ‘supplement’ the basic instrument.” See p. 4 (emphasis added). In its 2014 resolution, the Parliament noted that a delegated act “should be used where the basic act leaves a considerable margin of discretion to the Commission to supplement the legislative framework laid down in the basic act.” In its 2011 opinion, the Council Legal Service noted that if a “future measure will add new (non-essential) rules which expand the legislative framework of the basic act, particularly by leaving a considerable margin of discretion to the Commission . . . it could be considered . . . that the measure ‘supplements’ the basic act.” See point 17 (emphasis added). (All 3 documents cited *supra* note 35). However, in *Visa reciprocity*, the Council had argued that the level of discretion conferred on the Commission is “not relevant to any decision choosing between delegated acts and implementing acts.” See Opinion of A.G. Mengozzi in Case C-88/14, *Commission v. Parliament and Council*, EU:C:2015:304, para 23. See also Bast, op. cit. *supra* note 26, at 920.

amendment of a legislative act)?¹³³ Focusing on the framework set by the legislative act, such a suggestion should be rejected. Indeed, neither the delegated act nor the implementing act can redefine that framework, but the implementing act needs to take the framework as a given and give practical effect to it, while the delegated act can still elaborate the framework with further rules as long as they come *within* the framework as defined in the legislative act. It is also for this reason that Article 291 TFEU does not impose substantive limits or refer to the essential elements,¹³⁴ unlike Article 290 TFEU: the question of whether an implementing act can touch on essential elements does not arise, since an implementing act serves to give practical effect to the legislative act and can never, unlike the delegated act, change the legislative act.¹³⁵

The Court's further finding that the Commission's discretion cannot be used as an element to distinguish the delegated from the implementing act may then turn out to be a double-edged sword for the Commission,¹³⁶ since it also

133. In this regard, Kollmeyer remarks that in the freezing of (suspected) terrorists' assets, implementing acts are used to formally amend legislative acts. See Kollmeyer, *op. cit. supra* note 81, pp. 172–175. Bast argues in favour of allowing implementing acts to amend basic legislative acts but *inter alia* relies in this on what Craig has dubbed the transitional classification problem (see Craig, *op. cit. supra* note 34, at 675–77): some pre-Lisbon comitology procedures allowed for the amendment of legislative acts, meaning an implementing act (in the post-Lisbon sense) could amend legislation. See Bast, *op. cit. supra* note 26, at 922–923. However in light of Arts. 290 and 291 TFEU it seems more proper to argue that the transitional classification problem should instead be rectified. See also see Craig, *op. cit. supra* note 34, at 674.

134. Noting this difference between Arts. 290 and 291 TFEU, see Schütze, *op. cit. supra* note 28, at 687. Bergström found that the pre-Lisbon regulatory comitology procedure could be used to “apply the essential provisions of a legislative act” while, post-Lisbon, a delegated act could not be used for this. See Bergström, *op. cit. supra* note 19, p. 357. However, the real issue here is that the delegated act should in any case not be used to *apply* a legislative act's provisions.

135. Hofmann's suggestion to the effect that “[f]rom a teleologic point of view, however, [the non-delegation doctrine in Art. 290 TFEU] should also be applicable for the distinction between legislative and implementing acts” would further blur the difference between delegated and implementing acts. See Hofmann, *op. cit. supra* note 25, at 488. Voermans' conclusion illustrates this when he finds that “conferring an implementing power [under Art. 291 TFEU] of a general nature constitutes a delegation within the meaning of Art. 290 of the TFEU as well, so the delegation conditions would likely apply.” See Voermans, “The birth of a legislature: The EU Parliament after the Lisbon Treaty”, 17 *Brown Journal of World Affairs* (2011), 163–180, at 170. This should be contrasted with Blumann who rightly notes that Art. 291 TFEU not referring to essential elements “paraît justifié puisque cette dernière n'a pas pour vocation de compléter ou de modifier un acte de base mais uniquement d'en faciliter la mise en œuvre.” See Blumann, *op. cit. supra* note 28, at 27.

136. Earlier the Commission had noted that its powers under Art. 291 TFEU are “purely executive” whereas those under Art. 290 TFEU are “always discretionary”. See COM(2009)673, at 3. The Court did not pick up this suggestion and luckily so, given that “purely executive” implementing powers much resembles the Court's language in *Meroni*. See

means that it becomes more difficult to show that the Commission has misused its powers when adopting implementing acts.

Finally, there is the notion of amending which originally did not seem to be problematic.¹³⁷ “Amending” under Article 290 TFEU was understood as an intervention in the actual text of a legislative act. It is for this reason that the legislature had prescribed in the legislative act at issue in *Visa reciprocity* that a footnote be added to the annex. Without the addition of such a footnote, the Commission’s delegated act would not result in a *formal* amendment of the legislative act. However, in its ruling, the Court adopted a broad understanding of the notion of amending and included in it those measures that in their *effect* change the normative content of a legislative act. The technique whereby the legislature had, abusively according to the Commission, prescribed a formal amendment to the legislative act, therefore became irrelevant. A delegated act may then amend a legislative act without formally changing that act. However, this *Visa reciprocity*-notion of amendment was ignored by the Court in *Connecting Europe Facility*, when it stressed that amending means “modify[ing] or repeal[ing] non-essential elements laid down by the legislature in [a legislative] act.”¹³⁸

How does this issue in *Visa reciprocity* and *Connecting Europe* impact on the institutional balance? While the former may strengthen the position of the Commission beyond the actual wording of Article 290 TFEU, the latter reflects the institutional balance in that Article better. After all, since the distinction was introduced by the Treaty authors, it ought to be of relevance. Yet, in *Connecting Europe Facility*, the Court may have leaned to the other side, since it did more than simply distinguishing the two. This becomes clear if the Court’s approach is juxtaposed to that of the US Supreme Court, which has a rather consistent case law in which ambiguity in legislative drafting is taken as proof of Congress’ intent to delegate power to the administration.¹³⁹ The verb “to detail” indeed seems ambiguous if one has to classify it as either

also *supra* note 87. In its 2014 resolution, the Parliament also found that the Commission has considerable discretion under Art. 290 TFEU but only limited discretion under Art. 291 TFEU. See European Parliament Resolution of 25 Feb. 2014, point 1.

137. See Council Legal Service, 11 Apr. 2011, 8970/11, p. 6; COM(2009)673, at 4.

138. Case C-286/14, *Parliament v. Commission*, EU:C:2016:183, para 42.

139. The seminal case in this regard is *Chevron*, see US Supreme Court, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, [1984] 467 *United States Reports* 837, 842–843. For a finding that *Chevron* did not apply when an agency is authorized to *modify* legislation, since the term *modify* is unambiguous, see US Supreme Court, *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, [1994] 512 *United States Reports* 218, 225–226.

meaning supplementing or amending.¹⁴⁰ The Court of Justice, unlike the Advocate General, did not conclude from this ambiguity that it should be up to the Commission to choose between supplementing or amending. It clarified the institutional balance (in Art. 290 TFEU) in favour of the legislature, since it read a hierarchy (into Art. 290 TFEU) between amending and supplementing even if there is no immediate basis for this in the Treaty.

4.4. *Executive rule-making and Articles 290 and 291 TFEU*

The Lisbon Treaty's reform also raised the question what the new Articles meant for the locus of executive powers at the EU level. Mindful of the aims of the Laeken Declaration, one might expect that Articles 290 and 291 TFEU would constitute *the* framework for executive rule-making, making the Commission the primary wielder of the executive function.¹⁴¹ However, following the Lisbon Treaty executive power at EU level in general is still shared.¹⁴² Firstly, Article 291 TFEU still allows the Council to be empowered to adopt implementing acts, also outside the Common Foreign and Security Policy.¹⁴³ Secondly, the Treaties contain many enabling clauses, such as Article 43(3) TFEU at issue in the *Multi-annual cod plan* cases (see above), allowing the Council to adopt *sui generis* implementing measures.¹⁴⁴ How these relate to each other is not entirely clear. Kollmeyer argues that the possibility foreseen in Article 291(2) TFEU is purely declaratory, confirming the Council's executive competences in cases such as Article 43(3) TFEU.¹⁴⁵ However, a different reading of Article 291(2) TFEU would allow the EU legislature to exceptionally entrust implementation to the Council, also in cases not covered by provisions such as Article 43(3) TFEU. The issues when

140. Here it should be further noted that in *MCI* the Supreme Court simply had to interpret a provision in a legislative act (i.e. the authority to modify), without having to interpret it in the light of a provision of the Constitution (such as Art. 290 TFEU in Case C-286/14, *Connecting Europe Facility*).

141. Blumann notes in this regard: "En matière d'exécution et de délégation, la Commission paraît de plus en plus le détenteur *unique* de la fonction." See Blumann, op. cit. *supra* note 8, at 256 (emphasis added).

142. Craig, "European governance: Executive and administrative powers under the new constitutional settlement", 3 I-Con (2005), 407–439, at 421; Bermann, "Executive power in the new European Constitution", 3 I-Con (2005), 440–447, at 440.

143. Of course, since this possibility is expressly provided for under Art. 291 TFEU itself, these exceptions could still be said to come under Art. 291 TFEU.

144. Criticizing this as more than "an aesthetic failing of the simplification effort", see de Witte, op. cit. *supra* note 27, pp. 100–102. See also Stancanelli, op. cit. *supra* note 36, pp. 517–519.

145. Kollmeyer, op. cit. *supra* note 81, p. 350. However, this view is contradicted by the recent Case C-113/14, *Germany v. Parliament and Council*, EU:C:2016:635, paras. 56–57.

the Council may exceptionally be empowered¹⁴⁶ and how Council implementing acts relate to Commission implementing acts¹⁴⁷ will require further clarification from the Court. Lastly, the Treaties also provide for *sui generis* implementing powers of the Commission, e.g. in the area of the EU's competition policy. These observations beg the question whether there is scope for further exceptions to the default framework for executive decision-making.

4.4.1. *The PRAC as an exception to Article 291 TFEU: Netherlands v. Commission*

In all respects, the PRAC is the odd-one-out following the entry into force of the Lisbon Treaty. Acts adopted following the PRAC effectively fulfil the same functions as delegated acts, but they are adopted following a comitology procedure, even if they are not implementing acts under Article 291 TFEU. The idea was to change all pre-Lisbon references to the PRAC in EU legislation into references either to Article 290 or to the Comitology Regulation, but the alignment process is taking longer than anticipated.

So which procedure should be followed when the Commission, in an act adopted pursuant to the PRAC, prescribes that further “implementing” measures may be adopted? The General Court was asked to provide guidance in *Netherlands v. Commission*.¹⁴⁸ The Commission had implemented (in the pre-Lisbon sense) the Regulation on harmonized indices of consumer prices,¹⁴⁹ prescribing that Eurostat would adopt guidelines and manuals for the national statistical offices but without prescribing a clear procedure to do so.¹⁵⁰ The Netherlands *inter alia* questioned the Commission's acts on the ground that it ought to have prescribed the PRAC to adopt the guidelines and manuals, since that is the procedure indicated by the basic legislative act. In the alternative, the Netherlands argued that the Commission ought to have prescribed a procedure foreseen in the Comitology Regulation.

In a reasoning that may be supported, the General Court found that the manuals and guidelines constituted implementing measures aimed at the

146. Pre-Lisbon, the Court's scrutiny was rather marginal, see Case C-257/01, *Commission v. Council*, EU:C:2005:25. Blumann finds that following Lisbon it should be more difficult to empower the Council. See Blumann, op. cit. *supra* note 28, at 26; Blumann, op. cit. *supra* note 8, at 251. However, Kröll seems to suggest that this case law could also be applied post-Lisbon despite the stricter wording of Art. 291(2) TFEU. See Kröll, op. cit. *supra* note 1, at 287.

147. Notably the question whether there is a hierarchy between the two. Pre-Lisbon case law suggests there is, see Case C-159/96, *Portugal v. Commission*, EU:C:1998:550, para 41.

148. Joined Cases T-261/13 & T-86/14, *Netherlands v. Commission*, EU:T:2015:671.

149. Council Regulation (EC) 2494/95 concerning harmonized indices of consumer prices, O.J. 1995, L 257/1.

150. Art. 1 of Commission Regulation (EU) 119/2013, O.J. 2013, L 41/1; Art. 4 of Commission Regulation (EU) 93/2013, O.J. 2013, L 33/14.

uniform application of the Council Regulation, thus meeting the definition of implementing acts established by the ECJ in the *Biocides* case.¹⁵¹ However, the conclusion the General Court drew from this finding was less sound, since it annulled the relevant provisions of the Commission's acts finding that the Commission ought to have prescribed the PRAC.

This case does not clarify much when it comes to the adoption of soft law, since the Court clearly indicated that the manuals and guidelines were binding on the Member States' authorities.¹⁵² At first sight then, *Netherlands v. Commission* seems to indicate a concern on the part of the General Court for the integrity of Article 291 TFEU. After all, had the Court followed the Commission's reasoning it might have resulted in sanctioning the possibility to establish a new sphere of (*de iure* non-binding) executive acts outside the framework of Articles 290 and 291 TFEU.

In particular it is worth stressing the General Court's qualification of Eurostat's measures, since it did not automatically follow from *Biocides*. Indeed, it is not because the function of every implementing act is to add further detail (*Biocides*), that every act adding further detail is necessarily an implementing act (see also *Connecting Europe Facility*, and above).¹⁵³ Still, the General Court's ultimate conclusion, i.e. that the PRAC ought to have been prescribed, should be rejected. Indeed, had the General Court looked into Article 2(2) of the second comitology decision, it would have had to conclude that the measures *in casu* fell outside the PRAC's field of application. After all, in post-Lisbon terms, measures adopted pursuant to the PRAC are not implementing measures but measures which amend or supplement formal legislation (these measures do come under the pre-Lisbon notion of implementation). Thus, having found that the measures *in casu* are (post-Lisbon) implementing measures, the Court should have concluded that the PRAC was *a fortiori* not applicable and that the Commission should have prescribed one of the procedures foreseen in the Comitology Regulation.¹⁵⁴

151. Case C-427/12, *Commission v. Parliament and Council*, para 39.

152. Joined Cases T-261/13 & T-86/14, *Netherlands v. Commission*, para 48.

153. The General Court (at para 49) *inter alia* remarked that the Commission's reasoning would result in accepting the legality of secondary legal bases, an institutional practice which the ECJ had repudiated earlier.

154. This solution would have been similar to the one in *Common Market Fertilizers*. In that case the ECJ sanctioned the Commission's choice for a *de facto* advisory comitology procedure in an implementing measure even if the basic legislative act referred to the regulatory comitology procedure. The Court did so because the further acts to be adopted were individual measures, whereas the regulatory procedure could only be used (according to the second comitology decision) to adopt measures of general application. See Case C-443/05 P, *Common Market Fertilizers SA v. Commission*, EU:C:2007:511. For a discussion, see Kollmeyer, op. cit. *supra* note 81, pp. 317–318.

4.4.2. *Uniform conditions may not be sufficiently uniform: Spain v. Parliament and Council*

The scope of Article 291 TFEU partially depends on how the reference to “uniform conditions” in paragraph 2 is understood. Evidently, the easier this threshold is reached, the easier it is to confer implementing powers on the Commission. *Spain v. Parliament and Council*¹⁵⁵ was one of the many cases in the saga on the Unitary Patent Package. *In casu*, Spain had challenged the validity of Regulation 1257/2012 *inter alia* citing a violation of Article 291(2) TFEU since the Regulation instructed the Member States to set up a committee within the European Patent Office (EPO) (and therefore outside the EU) entrusting it with the task of deciding on the level and distribution of the renewal fees for unitary patents. In doing so, the committee had to respect the principles set out in Articles 12 and 13 of the Regulation, similarly to the situation at issue in *Biocides*. Just like in *Biocides*, the Court concluded that this qualified as implementation, albeit that it was implementation under Article 291(1) TFEU. Unfortunately, the Court’s reasoning fails to convince, since it argued that the Regulation instructs the Member States to give the EPO committee these tasks,¹⁵⁶ and that the EU Regulation is a special agreement within the meaning of Article 142 of the European Patent Convention (EPC).¹⁵⁷ While the latter may be true for the purposes of the EPC, this is not the case from an EU perspective. An act of secondary EU legislation cannot derogate from primary law, and as a result, a regulation cannot deviate from Article 291 TFEU even if it qualifies as a special agreement under the EPC. The Court tried to take the sting out of the problem by finding that the level and distribution of the renewal fees in any event did not necessarily need to be implemented under uniform conditions (the condition for Art. 291(2) TFEU to apply),¹⁵⁸ but this fails to convince completely: to renew a patent with unitary effect it is only logical that a uniform fee is paid. The negotiations within the committee on the renewal fees are testimony to this, since the president of the EPO had to work out different proposals before a compromise could be reached,¹⁵⁹ but in all the proposals the fees were set uniformly and there was not even mention of the possibility to set them other than in a

155. Case C-146/13, *Spain v. Parliament and Council*, EU:C:2015:298.

156. *Ibid.*, para 72.

157. *Ibid.*, para 82.

158. *Ibid.*, para 81. A.G. Bot dealt with this issue equally unconvincingly by finding that the principles set by the legislature did not leave any discretion to the Member States (which has been disproved by the difficult negotiations within the committee). See Opinion of A.G. Bot in Case C-146/13, *Spain v. Parliament and Council*, EU:C:2014:2380, paras. 125–126.

159. See Decision of the Select Committee of the Administrative Council of 15 Dec. 2015 adopting the Rules relating to Fees for Unitary Patent Protection, SC/D 2/15.

uniform manner.¹⁶⁰ While the very specific context in which this case was ruled should be recognized, the Court's interpretation of the requirement of uniform conditions risks undermining Article 291(2) TFEU.

4.4.3. *Executive measures outside Article 290 and 291 TFEU:* *Short-selling*

The idea that Articles 290 and 291 TFEU make up the default framework for executive rule-making was also undermined by the *Short-selling* case, in which the question at issue *inter alia* was whether the EU legislature can entrust an EU agency (a body not foreseen under the Treaties) to adopt binding measures that *de facto* meet the requirements and fulfil the function of the implementing act as defined in Article 291 TFEU. Before the financial crisis, the EU lacked a framework to regulate short-selling¹⁶¹ which Regulation 2012/236 has now introduced. The Regulation in the first place leaves it to the national authorities to address risks. Exceptionally, however, it also creates an emergency intervention power for the European Securities and Markets Authority (ESMA) if this is necessary for the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union.

In light of Article 291 TFEU it seems clear that in such cases the Regulation's common framework needs to be implemented under uniform conditions, begging the question whether such a power may be granted to the agency and should not instead be granted to the Commission (or exceptionally the Council). In answering this question, the Court remarked that it was "called upon to adjudicate on whether the authors of the FEU Treaty intended to establish, in Articles 290 TFEU and 291 TFEU, a single legal framework under which certain delegated and executive powers may be attributed solely to the Commission or whether other systems for the delegation of such powers to Union bodies, offices or agencies may be contemplated by the Union legislature."¹⁶² Remarkably and without looking at the *travaux préparatoires* or without relying on a "genetic" argument, the Court answered its second question positively: the power entrusted to the ESMA allegedly did not "correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU."¹⁶³ While such a non-correspondence could still result in either the legality or illegality of ESMA's power (depending on whether Arts. 290 and

160. See President of the EPO, Proposals for the level of renewal fees for European patents with unitary effect, 06/03/2015, SC/4/15; President of the EPO, Adjusted proposals for the level of renewal fees for European patents with unitary effect, 07/05/2015, SC/18/15.

161. Recital 1 of the Preamble to Regulation (EU) 236/2012 of the European Parliament and of the Council, O.J. 2012, L 86/1.

162. Case C-270/12, *United Kingdom v. Council and Parliament*, EU:C:2014:18, para 78.

163. *Ibid.*, para 83.

291 TFEU form an open or closed system), the Court concluded by finding that ESMA's power could not be "regarded as undermining the rules governing the delegation of powers laid down in Articles 290 TFEU and 291 TFEU."¹⁶⁴

The Court not only declared the Treaty framework to be an "open" framework, but it also failed to lay down any serious limits to the legislature's discretion in choosing between empowering the Commission or empowering an agency. In its reasoning, the Court simply refers to the fact that ESMA is called upon to act in "an area which requires the deployment of specific technical and professional expertise."¹⁶⁵ Ohler and Skowron have noted that this makes it easier for the legislature to empower an agency than it is to empower the Commission,¹⁶⁶ and it further begs the question of whether *Short-selling* introduces a new demarcation line in addition to that related to the (non-)essential elements and the one distinguishing Articles 290 and 291 TFEU: should a distinction also be made between "general expertise" (in which case the Commission is to be empowered) and "specific technical and/or professional expertise" (in which case an agency may (or should?) be empowered)? Again here, however, similar to *Biocides*, the legislature would have almost unfettered discretion.¹⁶⁷ Finally, it may be remarked that the Court in *Short-selling* also sanctioned the creation of secondary legal bases, contrary to its established case law.¹⁶⁸

4.4.4. *Post-Lisbon transitional problems of the third pillar: Visa Information System and Europol*

The problematic issue of secondary legal bases also figured in *Visa Information System* and *Europol*, which were further complicated by the fact that the Court had to rule on the validity of post-Lisbon measures adopted pursuant to pre-Lisbon procedures in accordance with the transitional provisions laid down in the Lisbon Treaty.

164. Ibid., para 86.

165. Ibid., para 82.

166. Ohler, "Rechtsetzungsbefugnisse der Europäischen Wertpapier- und Marktaufsichtsbehörde (ESMA)", 69 JZ (2014), 249–252, at 251; Skowron, "Kapitalmarktrecht: Rechtmäßigkeit der Eingriffsbefugnisse der ESMA nach Art. 28 Leerverkaufsverordnung", 25 EuZW (2014), 349–355, at 353.

167. In favour of such a discretion, see Lenaerts, "EMU and the EU's constitutional framework", 39 EL Rev. (2014), 753–769, at 763.

168. This issue was first dealt with in the *Minimum Common Lists* case, Case C-133/06, *Parliament v. Council*, EU:C:2008:257. For an extensive discussion, see Opinion of A.G. Maduro in the case, EU:C:2007:551, paras. 23–36. However, that case dealt with a secondary legal basis to adopt legislative measures. In Case C-540/13, *Visa Information System* (cf. *infra*), the Court also expanded the prohibition to cover non-legislative measures.

In both cases, the Parliament challenged a non-legislative act adopted by the Council pursuant to a legal basis provided in a (pre-Lisbon) third pillar legislative act. In this area, the Council could, following a proposal by the Commission or a Member State, unanimously adopt legislative acts, having consulted the Parliament.¹⁶⁹ The measures implementing these legislative acts could then be adopted by the Council using qualified majority voting (QMV) and having consulted the Parliament.¹⁷⁰ In *Visa Information System*,¹⁷¹ Article 18(2) of the Council's legislative act allowed it to decide on the entry into force of the regulation on a future date¹⁷² which it did through Decision 2013/392.¹⁷³ In *Europol* (see also above), the Council had adopted a list of third countries¹⁷⁴ with which Europol could conclude agreements pursuant to Article 26(1) of the Europol Decision, which provided that the Council could adopt such an implementing measure by QMV and having consulted the Parliament.¹⁷⁵ In both cases the Parliament challenged the Council's non-legislative decisions and further incidentally challenged the legality of the secondary legal bases provided for in the basic legislative acts.

In both cases the Court broadly followed the same approach, *inter alia* ruling that Article 9 of Protocol No 36 on Transitional Provisions to the Lisbon Treaty *generally* maintains the legal effects of pre-Lisbon acts in the field of police and judicial cooperation in criminal matters, thus including any provisions in those acts which prescribe specific procedures for adopting further measures.¹⁷⁶ However, in *Visa Information System*, the Court did confirm that the prohibition on the creation of secondary legal bases also encompassed legal bases designed to adopt non-legislative acts.¹⁷⁷ As noted, this stands in contrast with the Court's ruling in *Short-selling*, in which a secondary legal basis empowering an agency to adopt *de facto* implementing acts had been sanctioned.

In *Visa Information System*, then, the secondary legal basis provided for in Article 18(2) of the Council's (legislative) decision was saved by the Court applying a doctrine of constitutional avoidance:¹⁷⁸ although Article 18(2) did not refer to a consultation of the Parliament, the provision had to be read in the light of Article 39 of the (pre-Lisbon) EU Treaty, which did provide for such

169. See Art. 34(2) *iuncto* 39 of the (pre-Lisbon) EU Treaty.

170. See Art. 34(2)c *iuncto* 39 of the (pre-Lisbon) EU Treaty.

171. Case C-540/13, *Parliament v. Council*, EU:C:2015:224.

172. See Art. 18(2) of Decision (JHA) 2008/633 of the Council, O.J. 2008, L 218/129.

173. Decision (EU) 2013/392 of the Council, O.J. 2013, L 198/45.

174. Council Implementing Decision (EU) 2014/269, O.J. 2014, L 138/104.

175. See Art. 26(1) of Decision (JHA) 2009/371 of the Council, O.J. 2009, L 121/37.

176. Case C-540/13, *Parliament v. Council*, paras. 42–5; Case C-363/14, *Parliament v. Council*, paras. 69–70.

177. Case C-540/13, *Parliament v. Council*, para 33.

178. *Ibid.*, para 38.

a consultation. While not finding an illegality in the legislative decision itself, the contested decision was still annulled because it had been adopted by the Council without having consulted the Parliament. Ironically, the Council tried to save its decision by invoking Article 291 TFEU which does not foresee a consultation for the Parliament. According to the Council, imposing such a requirement would then “jeopardize the institutional balance established by the Treaty of Lisbon.”¹⁷⁹ The Court rightly rejected this argument, noting that Article 291 TFEU was irrelevant since the controversy *in casu* was not governed by the new Lisbon Treaty rules in the first place.¹⁸⁰

In *Europol* the Parliament principally argued that the list of third countries touched on the essential elements (see discussion above) or that at “the very least, it should be regarded as a normative element which must be the subject of a delegated act within the meaning of Article 290 TFEU rather than an implementing act within the meaning of Article 291 TFEU.”¹⁸¹ Of course, in the light of Article 9 of the Protocol on Transitional Provisions, the Court was unconvinced by this argument.¹⁸² Since the secondary legal basis in the Europol Decision imposed the same procedure as provided for under the (pre-Lisbon) EU Treaty, the Court in the end dismissed also this plea of the Parliament.¹⁸³

4.4.5. *The Courts’ failure in upholding Articles 290 and 291 TFEU*

It is clear from these cases that the Courts did not uphold Articles 290 and 291 TFEU, but did they also fail in doing so? It appears that these cases are quite a mixed bag. In *Visa Information System* and *Europol*, the Court cannot be faulted for not following the Parliament’s reasoning. As the Court found, the Parliament’s interpretation of Article 9 of Protocol 36 would complicate or even prevent the proper application of all pre-Lisbon legislation in the field of police and judicial cooperation in criminal matters.¹⁸⁴ While it is regrettable that this may significantly postpone the full *communitarisation* of the former third pillar, the Court cannot be faulted for a conscious choice of the Treaty authors. Indeed, as Advocate General Wahl noted,¹⁸⁵ Article 9 does not provide for any time limit and therefore maintains the legal effects of

179. *Ibid.*, para 52.

180. *Ibid.*, para 58.

181. Case C-363/14, *Parliament v. Council*, para 33.

182. *Ibid.*, para 71.

183. *Ibid.*, para 73.

184. Case C-540/13, *Parliament v. Council*, para 45; see also the Joint Opinion of A.G. Wahl to Joined Cases C-317 & 679/13 and Case C-540/13, *Parliament v. Council*, EU:C:2015:35, paras. 42–51.

185. *Ibid.*, para 44.

pre-Lisbon secondary legislation until that legislation is amended or repealed. The same political problem was at issue in *Netherlands v. Commission*, since the Treaty authors did not opt for a solution which automatically replaces the PRAC with a procedure to adopt delegated acts and did not lay down a time-limit for updating the existing body of legislation to the new Lisbon framework.¹⁸⁶ As a result, the (pre-Lisbon) PRAC will continue to be relevant (post-Lisbon), as long as each (pre-Lisbon) legislative act referring to the procedure has not been amended or repealed. That this is taking longer than initially expected has been noted elsewhere.¹⁸⁷ Still, the General Court can be faulted for its legally flawed reasoning resulting in Article 291 TFEU not being fully upheld. A consequence of the Court's ruling is that six years following the entry into force of the Lisbon Treaty new (non-legislative) acts may still be adopted introducing the PRAC for further rule-making.

Even if upholding Articles 290 and 291 TFEU in *Short-selling* could have been "foolish judicial disregard for the vital need to ensure continuing financial stability within Europe",¹⁸⁸ the blank cheque given by the Court to the legislature to "elaborate" the framework of Articles 290 and 291 TFEU actually undermines and potentially nullifies that framework. This criticism of the Court may seem too harsh, since again it was confronted with the (conscious) negligence of the Treaty authors: when the framework of Articles 290 and 291 TFEU was originally drafted, the Treaty authors were well aware of the existence and growing importance of the EU agencies. Thus, already in 2004 the new Constitutional Treaty was outdated in respect of the (implementing) acts adopted by the agencies.¹⁸⁹ In all earnest, then, the Court could not have come up with an elegant and legally sound solution; but the Court may still be faulted for its remarkably blunt conclusion to the effect that the Treaty framework is open and that no special requirements have to be met before the legislature may empower an agency.

Finally, the Court's ruling in *Spain v. Parliament and Council* is the most open to criticism, even if here as well the Court will have been mindful of the consequences of strictly upholding Article 291(2) TFEU. Since it took the Member States more than 40 years to agree on a unitary patent, the Court

186. Sydow suggests that the Treaty authors may have mistakenly assumed that only the regime under Art. 291 TFEU would require a horizontal instrument. See Sydow, op. cit. *supra* note 125, at 162.

187. Chamon, op. cit. *supra* note 31, at 721–723.

188. Everson, "European agencies: Barely legal?", in Everson, Monda and Vos (Eds.), *European Agencies in between Institutions and Member States* (Kluwer Law International, 2014), p. 50.

189. Criticizing this, see de Witte, op. cit. *supra* note 27, pp. 99–100; Vos, op. cit. *supra* note 96, at 230.

might have thought it politically unwise to hinder a compromise a second time,¹⁹⁰ possibly dealing a fatal blow to the project.

5. The Interinstitutional Agreement on Better Law-making and the Common Understanding on Delegated Acts

As noted above, the actual reform brought by the Lisbon Treaty is determined in a number of rounds, one of which is the adoption, by the institutions, of infra-constitutional norms on Articles 290 and 291 TFEU. While Article 291(3) TFEU itself instructs the institutions to adopt such a binding norm, Article 290 TFEU does not. Nevertheless, to ease the legislative process, the institutions in 2011 also adopted a Common Understanding, on delegated acts, recently replaced by the Common Understanding annexed to the Interinstitutional Agreement (IIA) on Better Law-making.¹⁹¹ While the Common Understanding would fulfil the same function as the Comitology Regulation, its status as a genuine norm of infra-constitutional law is less clear given the legal nature of interinstitutional agreements.¹⁹² Still, the IIA, which is binding, includes a number of important commitments which the institutions have entered into *vis-à-vis* each other, codifying both existing practices and parts of the Courts' case law as well as introducing new arrangements.

In the IIA, the institutions confirm that it is up to the legislature "to decide whether and to what extent to use delegated or implementing acts, within the limits of the Treaties". This provision may be read as codifying *Biocides* and *Visa reciprocity*,¹⁹³ but it may also confirm the legislature's freedom to exhaustively regulate a certain matter.¹⁹⁴ Importantly, through the IIA, the

190. This following its Opinion 1/09 re the creation of a unified patent litigation system, EU:C:2011:123.

191. IIA on Better Law-Making, O.J. 2016, L 123/1.

192. Art. 295 TFEU provides: "The European Parliament, the Council and the Commission . . . may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature." While the present IIA is binding, not all of the IIAs are and some may be merely politically binding, see Driessen, *Interinstitutional Convention as Checks and Balances in EU Law* (Katholieke Universiteit Leuven, 2006), Phd Thesis, p. 72; Hummer, "From 'interinstitutional agreements' to 'interinstitutional agencies/offices'?", 13 ELJ (2007), 47–74, at 57–65. Driessen finds that some of the IIAs in the EU are the "substantive equivalent of national (organic) laws." See Driessen, p. 70.

193. Reading the provision in this way, see Tovo, "I nuovi equilibri tra potere esecutivo e legislativo nell'Unione europea: l'accordo interistituzionale "legiferare meglio"", 7 Apr. 2016, available at: <rivista.eurojus.it>, p. 2.

194. Ibid. See also *supra* note 41.

Commission commits to consult “all necessary expertise, including through the consultation of Member States” experts’ before adopting delegated acts. Further, the institutions have committed to adopt further (albeit non-binding) criteria for the application of Articles 290 and 291 TFEU. By the end of 2017 a register will also be set up “to enhance transparency, facilitate planning and enable traceability of all the different stages in the lifecycle of a delegated act.” This is to be lauded in light of one of the drawbacks of the Lisbon Treaty: pre-Lisbon the comitology register and the yearly report covered all comitology procedures, but since comitology has shrivelled to Article 291 TFEU acts, the delegated acts are not recorded any more.¹⁹⁵ A register for delegated acts will now re-introduce this transparency.

Crucially, and recognizing the infra-constitutional character of the Comitology Regulation,¹⁹⁶ the institutions agree that no further procedural requirements altering the mechanisms for control foreseen in the Comitology Regulation should be introduced. This raises the question whether the current practice of the mandatory involvement of some of the decentralized agencies (notably the European Supervisory Authorities) in the drafting of implementing acts is in line with the IIA.¹⁹⁷ The Common Understanding (CU) on delegated acts essentially takes over the 2011 CU, elaborating only the section on “consultations in the preparation and drawing up of delegated acts”. However, the additions to the new CU are significant: whereas the old CU instructed the Commission to generally consult experts, the new CU clarifies that the Commission is obliged to consult *Member States’* experts¹⁹⁸ and the Council and Parliament may now also send their own experts to these meetings.¹⁹⁹ Further, the Commission is obliged to make clear what conclusions it has drawn from the Member States’ experts’ input and how it will take this input into account.²⁰⁰ Where a draft delegated act is reworked, the Commission is further obliged to send the new draft back to the experts for comments.²⁰¹ Finally, the Commission will have to make “indicative lists of planned delegated acts . . . at regular intervals.”²⁰² Here the Commission has

195. Noting this, see Chamon, op. cit. *supra* note 34, at 67.

196. If the comitology regulation would form part of the body of ordinary secondary legislation any other legislative act could introduce ad hoc comitology procedures, deviating from those set out in the comitology regulation.

197. The procedural requirements imposed on the Commission by the ESA Regulations constrain the Commission to such a degree that assistance seems ill-fitting to describe the ESAs’ role.

198. See point 4 of the Common Understanding.

199. Ibid., point 11.

200. Ibid., point 5.

201. Ibid., point 7.

202. Ibid., point 9.

failed to safeguard its “large measure of autonomy” which it (rightly) claimed in its 2009 Communication.²⁰³

The new CU thus greatly strengthens the role of the Member States in the adoption of delegated acts. Even if this is merely a codification of existing practices, it is significant because it *de facto* (re-)introduces comitology to Article 290 TFEU. Indeed, the requirements imposed on the Commission by the CU result in a procedure resembling the comitology advisory procedure.²⁰⁴ On this, Tovo rightly concludes that this “weak” comitology procedure allows the Member States to intrude on the EU’s legislative function, which does not make sense from a constitutional point of view.²⁰⁵ Again part of the Lisbon Treaty’s reform is being undone, even if the Member States’ involvement can also be seen as a form of assistance (rather than control) and even if the arrangement laid down in the CU is indeed a weak form of comitology compared to the pre-Lisbon procedures.

The institutions’ commitment in the IIA to lay down further criteria distinguishing Articles 290 and 291 TFEU (see above) seems much like an empty box, since the Court already confirmed that the legislature has full discretion in this (within the limits set by the Treaties). As a result, there is no reason for the legislature (especially the Council) to work out any criteria, which explains why the IIA already foretells that they will be non-binding.²⁰⁶

6. Conclusion

Combining the Courts’ case law and the political institutions’ Common Understanding, it is possible to properly assess the Lisbon Treaty’s reform through Articles 290 and 291 TFEU. While on paper the institutional balance had been significantly redefined, the Court has curtailed the reform by reading a different institutional balance into Articles 290 and 291 TFEU, and the institutions have partially aligned their practice to the pre-Lisbon institutional balance. As a result, seven years following the entry into force of the Lisbon Treaty, the original positive reception of its reform through Articles

203. The Commission found that since Art. 290 TFEU was silent on the “procedure by which the Commission adopts a delegated act, . . . the Commission enjoys a large measure of autonomy in this matter.” See COM(2009)673, at 6.

204. The two procedures are not identical however. For instance, Art. 3(4) of the Comitology Regulation provides *inter alia* that the Commission “shall endeavour to find solutions which command the widest possible support within the committee” but such an obligation is not imposed by the CU.

205. See Tovo, *op. cit. supra* note 193, p. 3.

206. As a result, Tovo believes the future criteria will be an unnecessary duplication of the criteria listed in Parliament’s 2014 resolution. See Tovo, *op. cit. supra* note 193, p. 2.

290 and 291 TFEU will have reversed in a certain disillusionment. While Articles 290 and 291 TFEU could never have constituted the sole framework for executive rule-making, given the *sui generis* implementing powers of the Council (and Commission), the Court also failed to uphold the new framework.

The post-Lisbon institutional balance is not a break with the past; instead it is (merely) the latest stage in the continuous development of comitology. In this regard, the following issues are critical: firstly, the distinction between legislative and non-legislative acts, introduced by the Court in *Köster* and codified by the Lisbon Treaty, is a demarcation line that is effectively enforced by the Court. This is different from the distinction between delegated and implementing acts, which the Court has left to the discretion of the legislature. The Court's differentiated approach is puzzling. Does the Court only enforce the former because it originally introduced it itself? While its rulings in *Biocides* and *Visa reciprocity* may be seen as a continuation of its traditional comitology case law, this sits uneasily with its ruling in *Connecting Europe Facility* where it did go beyond the letter of Article 290 TFEU, expanding the non-delegation doctrine. One way to make sense of these cases is to see them as the Court restricting itself to enforcing the primacy of the legislature (see also *SBC*, *Europol* and *Multi-annual cod plan*). Insofar as this primacy is safeguarded, the Court then largely resigns itself to institutional practice without totally relinquishing its prerogative to scrutinize the political institutions' acts. The result is an institutional balance that is largely favourable to the legislature, but which does not conform to the institutional balance enshrined in Articles 290 and 291 TFEU since it does not safeguard the Commission's prerogatives. Here the Court's post-Lisbon case law stands in stark contrast with its post-Lisbon case law in the area of external relations, where it has ruled many cases in favour of the Commission.

While some of the other cases decided by the Courts were criticized as well, they do not amount to instances of constitutional denial. Unavoidably, it takes some time before the General Court has aligned its case law to that of the ECJ (*Czech Republic v. Commission* and *Connecting Europe Facility*) and its ruling in *Netherlands v. Commission* may be deplored since it effectively undermines Article 291 TFEU, but is also the result of the Council's unwillingness to fully align all pre-Lisbon legislation to Articles 290 and 291 TFEU. Similarly, it should be hoped that the Court's dubious finding on the need for uniform conditions in *Spain v. Parliament and Council* is a by-product of this very special case and will not set a precedent. Likewise in *Short-selling* the Court ruled unsatisfactorily, but it should not be forgotten that it was confronted with a problem which the primary legislature should (and could) have addressed in several IGCs. Similarly, the issues in

Netherlands v. Commission, Visa Information System and Europol resulted *inter alia* from the Treaty authors' omission to work out more detailed transitional arrangements. This further links up with the critique on the recent Common Understanding on delegated acts, in which the political institutions themselves have codified a form of comitology, disregarding the institutional balance resulting from Article 290 TFEU.

What does all this mean for the Community method? While the new institutional balance (on paper) marked a shift thereto, the institutional balance as it follows from the Court's jurisprudence is not a radical break with the past. As a result, the move towards the Community method is not fully pushed through. It was noted above that the Community method was visible in Articles 290 and 291 TFEU because these Articles map out the roles to be played by the different institutions (and Member States) in function of the actual interests at stake; because the supranational institutions were strengthened; and because the legal framework in primary law was elaborated, allowing the Court to further subject the political sphere to abstract legal principles. The sections above show how both the political institutions and the Court have detracted from this. By allowing the legislature a discretionary choice between Article 290 and 291 TFEU, the fundamental distinction between the two is undermined. By resigning itself to institutional practice, the Court has missed opportunities to structure the political process; and by agreeing to re-introduce comitology to Article 290 TFEU, the institutions have ignored the fact that the Member States (as such) should not be involved in Article 290 TFEU procedures.

The recent IIA on Better Law-making and the Common Understanding on delegated acts indeed show how also the political institutions may prefer continuity to change, since one of the novelties under Article 290 TFEU, i.e. the absence of a comitology procedure, has been effectively undone. The result is similar to the Single European Act's changes to the comitology system (although the SEA's changes were not even revolutionary on paper): an incremental change of the institutional balance. The actual institutional balance in this area is then still a long way off from the Community method, even if Articles 290 and 291 TFEU held unseen potential to introduce it also in the area of executive rule-making.

In light of both the express provisions and the objectives of the Lisbon Treaty these political and jurisprudential developments should be deplored, but it may be vain hope to think that the institutions will reconsider the chosen path. The Lisbon Treaty has not realized its revolutionary potential and instead has proven to be one of the many evolutionary changes for the normative framework governing the implementation of EU law.

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